Montana Law Week Search

Insurance Bad Faith Verdicts/Judgments/Settlements

1/96 - 3/17/07

Prepared for: Randy Nelson.

VERDICT: Defense, insurance bad faith.

A 9-3 Missoula jury found that Conifer Logging did not prove by clear & convincing evidence that John Deere Ins. was guilty of actual malice in handling its insurance claim.

Conifer took delivery of a feller-buncher from Jones Equipment 6/17/91. It used the machine on a trial basis for 1 free demo week, then leased it beginning 6/24, paying 1 month's rent. It soon discovered problems and arranged to return the machine to Jones 7/18, after about 1 month of use. On 7/17 the machine was destroyed by fire.

Conifer carried a "contractor's inland marine policy" with Deere which covered "newly acquired property." Deere refused to cover the machine. Federated Mutual Ins. paid Jones for the loss, then sued Conifer for indemnity. Conifer filed a third-party complaint against Deere seeking coverage and alleging **bad faith.** Judge Larson granted summary judgment for Conifer on coverage.

Larson's coverage ruling was affirmed by the Supreme Court (MLW 7/20/96). Even though Conifer's **bad-faith** claim against Deere was not before it, the Supreme Court held that Deere's reasons for denying coverage were unreasonable, and assessed sanctions in the amount of Conifer's fees & costs based on Deere's inconsistent & conflicting positions, inaccurate citations, and lack of support for its claims. Following the Supreme Court ruling Deere paid all amounts owed to Conifer under its policy arising from loss of the feller-buncher—about $143,000 including interest.

On remand Larson granted summary judgment for Conifer on the **bad-faith** claim, based on the Supreme Court's findings in the coverage appeal. He also ruled that the $143,000 wrongfully withheld under the policy constituted actual damages caused by the **UTPA** violation. The case proceeded to trial on actual fraud and actual malice. Conifer withdrew the fraud claim during trial and Larson directed verdict on that issue. Larson declined to instruct that Deere had previously paid Conifer the full $143,000. Conifer's expert Al Campbell testified that Deere had ignored numerous provisions of its own claims-handling policies. Deere sought to have 2 lawyers from the coverage case—its own counsel Robert Phillips and Federated's counsel Terry MacDonald—testify as experts that there was a reasonable basis for denial of coverage, but Larson ruled their testimony inadmissible as contrary to the Supreme Court opinion. Deere was also precluded from introducing statements by Anderson indicating that he had no intent to insure the equipment and had never accepted it. Larson ruled that information not known to Deere when it denied coverage was inadmissible.

The central issue at trial was whether Deere's adjusters acted with malice in denying coverage under the "newly acquired equipment clause" which required notice to Deere of acquisition within 30 days. Deere denied coverage because the fire occurred 31 days after Conifer had taken possession. Based on the Supreme Court opinion Larson instructed that Deere's definition of "acquire" to mean "possess" was unreasonable, Deere's determination that the fire occurred on the 31st day violated the universal rule that the first day is never counted and was unreasonable, and Deere's argument that notice to the agent within 30 days was a prerequisite for automatic coverage was unreasonable. He also instructed on "malice" pursuant to §27-1-221. Deere's adjusters testified that they denied coverage because they construed the policy broadly as providing coverage from the day that possession was delivered, and that under this clause Deere has paid for losses occurring on the first day that the insured took possession of the property. They testified that they always construed "acquire" broadly and would pay under this clause in cases where the insured came into possession of the equipment by any lawful means, whether with or without a lease, sale, or obligation to pay rent, and without regard to whether the insured had already assumed the risk of loss for the equipment in his possession.

Plaintiff's expert: Allan Campbell, Boise (**insurance bad faith**).

Defendant's experts: Deere adjusters Ron Delp & Richard Manfull, Moline, Ill., and Gary Hoffman & Carrie Russell, Milwaukee; CIM underwriter Sam Mason, Jackson, Miss.; Dave Monser, Missoula (claims handling).

Demand, $900,000; offer, $200,000.

Jury deliberated 3½ hours 6th day.

***Conifer Logging v. John Deere Ins.*, Missoula 78138, 10/7/97.**

Thomas Beers & Matthew Clifford (Connell & Beers), Missoula, for Conifer; Shelton Williams & Mark Williams (Williams & Ranney), Missoula, for John Deere.

Supreme Court - Civil

INSURANCE/PROCEDURE: Motion to amend pleadings timely... insured entitled to argue insurer's appeal conduct to show malice... sufficiency of evidence argument preserved despite no motion for directed verdict... malice properly submitted to jury... improper closing comment on excluded witnesses... inadequate instruction on law of case... summary judgment on UTPA proper based on collateral estoppel and law of case... defense experts properly excluded... relation back of amendment... no exclusion of investigation/claim denial conduct because of statute of limitations... defense verdict reversed... Larson reversed, affirmed.

Conifer Logging leased a feller buncher from Jones Equip. Before the lease began Conifer was entitled to a 1-week trial without obligation or risk. The lease began 6/24/91 when Conifer kept the machine and made its first payment. It soon discovered problems and decided to terminate, but before the machine could be returned it was destroyed by fire. Conifer had a "contractor's inland marine policy" with John Deere Ins. which covered "newly acquired property." Federated Mutual Ins. paid Jones for the loss, then sued Conifer for indemnification. Conifer filed a third-party complaint against Deere alleging that the machine was insured

pursuant to its policy with Deere. Deere moved for summary judgment, arguing that the machine was never insured by it because the loss occurred before Conifer had notified it of Conifer's acquisition and after the 30-day notice requirement for "newly acquired property" had expired. Judge Larson granted summary judgment for Conifer. We affirmed in *Federated Mutual I*, concluding that the uncontroverted facts establish that although the feller buncher was delivered 6/17/91, Conifer's lease was delayed by the trial week and did not start until 6/24. Because neither Conifer nor Jones intended any ownership interest or risk of loss to pass to Conifer until the lease commenced, Conifer did not "acquire" it pursuant to the newly acquired property provision until 6/24. Its destruction on 7/17 and Conifer's notice to Deere of the loss on 7/18 were within the 30-day automatic coverage period. We further concluded that Deere's appeal was without merit and assessed sanctions in the amount of Conifer's fees & costs. On remand Conifer moved to amend to include a UTPA claim based on both Deere's prelitigation actions and its conduct during litigation. Larson allowed the amendment with respect to prelitigation actions only. He ruled on summary judgment that Deere's conduct was unreasonable. A Missoula jury found that Conifer Logging did not prove that Deere was guilty of actual malice in handling its claim (MLW 10/18/97:5). Conifer appeals the verdict; Deere cross-appeals the summary judgment. The verdict is reversed and remanded for new trial. The cross-appeal issues are affirmed.

Conifer's motion to amend the pleadings was not untimely. Although pleadings had been closed for more than a year and summary judgment motions had been ruled on and appealed, this is the "extraordinary case" contemplated by *Peuse* (Mont. 1996). Deere's meritless appeal, on which Conifer sought to base its amendment, did not occur until after the pleadings were closed and after summary judgment. The timing of Conifer's motion was not the result of delay, **bad faith**, or dilatory motive. Nor was Deere unduly prejudiced by the timing, because the only issue decided by summary judgment was whether the feller buncher was covered by the policy and the amendment was not relevant to resolution of that issue.

Larson abused his discretion when he denied Conifer's motion to amend to allege a meritless appeal as a basis for its claim. Although an insurer's litigation tactics and strategy for defending a claim are not generally relevant to the decision to deny coverage, meritless appeals are not legitimate litigation conduct. Deere's fundamental right to defend extends only to legitimate litigation conduct and the relevance of its frivolous appeal outweighs any prejudice which may result to its defense as a result of amendment to include the frivolous appeal. The merits of Deere's appeal have already been decided by this Court: as a matter of law it prosecuted a meritless appeal. Sanctions have been assessed to compensate Conifer for defending a frivolous appeal. However, no fact-finder has yet determined whether Deere's actions on appeal were part of an unfair settlement practice and if so whether Conifer was damaged. Conifer was entitled to present proof to the jury that Deere's **bad faith** was a continuing course of conduct. Its postjudgment conduct is admissible to prove malice.

Conifer contends that the verdict that malice had not been proven is not supported by the evidence because it showed that Deere acted with reckless disregard for its own adjusting standings while Deere produced no contrary evidence. Deere contends that Conifer waived its right to argue sufficiency of the evidence when it failed to move for a directed verdict, and in any event failed to produce any evidence of malice. Deere cites Rule 50(b) (motions for judgment as a matter of law) and notes that federal cases applying the virtually identical rule preclude a party from questioning sufficiency of evidence on appeal if it did not move for a directed verdict. However, "when a case comes before this Court where a motion for a new trial has not been made, this Court will review the evidence to determine whether there is any substantial evidence to justify the verdict." *Johnson* (Mont. 1982). Therefore, Conifer's sufficiency of evidence argument is properly considered. However, drawing all reasonable inferences from the evidence we conclude that there was sufficient evidence to submit the malice issue to the jury.

Conifer's right to a fair trial was materially impaired by Deere's improper comments during closing that:

> Now Mr. Beers says, well, Mr. Williams didn't call any experts to talk to you about the case. I don't think that's a fair criticism on Mr. Beers' part, because he knows full well that I had two experts listed and have had them listed for months. I was prevented from using them, because he objected to them.

Although Larson had excluded the witnesses, Deere's statement implies that Conifer somehow concealed evidence from the jury. Comments on exclusionary rulings are improper. Improper argument requires reversal when prejudice has resulted which prevents a fair trial.

Larson failed to adequately instruct on the law of the case. Conifer offered an instruction setting forth 3 paragraphs from *Federated Mutual I* as facts which had been determined true as matter of law. Larson rejected the proposed "law of the case" instruction. The instructions given stated only the conclusion which this Court reached in *Federated Mutual I*, while Conifer's proposed instructions stated the specific facts upon which those conclusions were based. Larson's instructions that coverage applied and Deere did not have a reasonable basis for disputing coverage would ordinarily have been adequate. However, in light of Deere's repeated efforts to prove that it had acted reasonably they were inadequate. Larson warned prior to trial that reasonableness of Deere's actions was no longer an issue and the parties were not to present testimony regarding it. However, during trial Conifer objected 29 times to attempts by Deere to portray its actions during the coverage

dispute as reasonable. 23 objections were sustained, but Larson did not sanction Deere for its repeated attempts to offer improper evidence that it had acted reasonably. As a result of the instructions given and Deere's violation of the pretrial ruling, Deere in effect relitigated several fact issues previously settled by this Court. Beginning with its opening statement Deere attempted to establish that a large part of the disagreement was whether it was necessary to count the first day when computing a 30-day coverage period, and to suggest that this dispute was "reasonable" until settled by *Federated Mutual I.* However, *Federated Mutual I* had already determined that the 30-day period for automatic coverage did not expire until 7/24/91, 1 week after the feller buncher was destroyed, and that Deere had no reasonable basis for disputing the length of the coverage period because it had known this since 8/21/91. Considering the instructions in light of Deere's repeated violations of the ruling precluding argument contradicting prior rulings on coverage and liability, the instructions failed to adequately present the law of the case.

Larson properly granted summary judgment on Deere's liability and properly instructed that it had acted "unreasonably." *Federated Mutual I* affirmed facts which were essential to that prior summary judgment, were not disputed, and were therefore established as law of the case. Collateral estoppel prevents relitigation of those facts, which Conifer relied on to move for summary judgment on UTPA liability. The same facts which were previously established preclude Deere from establishing that it had a reasonable basis for contesting the claim. Nor can Deere show prejudice in the instructions that its behavior was "unreasonable as a matter of law," based on law of the case, because it won a defense verdict. Because the parties will have an opportunity to submit new instructions on remand we decline to address this argument. Nor were Deere's due process rights violated, because it had an opportunity to present evidence of a legitimate fact dispute during summary judgment proceedings in both the coverage phase and on remand but failed to do so.

Larson did not abuse his discretion in excluding testimony of former Deere counsel Robert Phillips and Federated counsel Terry McDonald. He concluded that Phillips's testimony would create unnecessary confusion and his proffered legal conclusions were largely irrelevant, and that McDonald's proffered testimony that Deere had a colorable argument for denying the claim would similarly create confusion for the jury because of his prior involvement in the underlying case.

Larson did not abuse his discretion in letting Conifer amend to include a UTPA claim after expiration of the statute of limitations. The UTPA claim arises from the same transaction alleged in the original complaint—that Deere wrongfully refused to provide coverage and settle promptly and fairly. The original complaint, while lacking a prayer for punitives, does allege that Deere wrongfully refused to provide coverage. Therefore, the amendment relates back to the original complaint within the ambit of Rule 15(c). Deere appears to have also raised the question of whether the original complaint was time-barred, but failed to raise it as a defense in its answer to the original complaint and cannot raise it now.

Larson did not abuse his discretion in admitting evidence of Deere's pre-11/91 investigation conduct. Deere contends that on retrial the evidence should be limited to acts which occurred within the statute of limitations period. However, its alleged failure to conduct a reasonable investigation and subsequent refusal to pay the claim, if proved, is part of a continuing course of conduct which began in 7/91 when Conifer notified it of the loss and continued well past the time the third-party complaint was filed in 11/93.

Trieweiler, Turnage, Nelson, Hunt, Leaphart.

***Federated Mutual Ins. v. Anderson (Conifer Logging) v. Jones Equipment and John Deere Ins.*, 98-77, 11/23/99.**

Thomas Beers & Matthew Clifford (Beers Law Office), Missoula, and Michael Alterowitz (Alterowitz Law Offices), Missoula, for Conifer; Shelton Williams (Williams & Ranney), Missoula, for Deere.

Federal Trial Courts

VERDICT: Defense, bicycle/phantom motorist, arm/leg/shoulder fractures.

A 9-0 Great Falls jury found that a motorist was not negligent in connection with injuries sustained by Patricia Martin in 6/93 from a bicycle accident on Main St. in Lewistown while riding with her dog on a leash.

Martin claimed that an unidentified motorist had either hit her bike or come too close, causing her to wreck. Her insurance agent saw her at the Fergus Co. fair in July and she told him that she had been hit by a car. He turned in a claim for UM coverage, which under her Mountain West policy had a $50,000 limit. Police were unable to find any clear physical evidence of vehicle involvement. Medical reports from the EMT, nurses, and doctors revealed statements by Martin that a car had come too close, but also that a car had passed by, causing her dog to rear in front of her bike, causing her to swerve and wreck. Martin published an ad in the Lewistown paper seeking witnesses. She claimed that in September she received an anonymous call from a man who admitted that it was his fault. She claimed that in 1/94 she received an anonymous greeting card with $100 and the message: "I want to help. It was a accident." Her mother-in-law testified that she witnessed her receipt of the call and her son testified that he witnessed her receipt of the card. Despite Martin's requests, police refused to have the card analyzed for fingerprints. Mountain West denied the claim.

Martin sued in Fergus Co. Court for breach of contract and violation of the **UTPA**, and asked that coverages be stacked to $157,000 based on 3 vehicles. Mountain West removed to Federal Court and moved for summary judgment on the **UTPA** claim. The parties agreed to dismissal of the **UTPA** claim with prejudice in exchange for Mountain West not pursuing medical records from previous injuries and psychological treatment or mentioning any prior treatment at trial. They also stipulated to admission of all medical records to avoid the need to depose numerous health care providers. Mountain West moved for summary judgment on stacking, which was agreed to be a posttrial issue in the event of an award for Martin. It also asserted a collateral source offset based on Martin's health insurer's payment of medicals with no right of subrogation, which Martin disputed.

Martin, 50, sustained a fractured humerus, a 4-part comminuted open break tibia fracture, and a comminuted shoulder fracture. Medicals after 4 surgeries were $84,000, and she likely will undergo another surgery at $15,000-$22,000.

Martin contends that Mountain West's med pay requirement of physical contact by a motor vehicle with Plaintiff or a bicycle to recover is void as against public policy. Martin claims, and Mountain West denies, that she is entitled to stack the med pay. The jury determined, after being instructed that its answers had nothing to do with its previous finding as to whether a motorist was negligent, that there was no contact between a motor vehicle and Martin's body or bicycle. This will be a posttrial issue.

Plaintiff's expert: orthopedic surgeon Stephen Davenport, Billings (deposed).

Defendant's experts: 4 Lewistown police officers.

Demand, $50,000; offer, $15,000. Jury request, left to discretion; jury suggestion, $0.

Jury deliberated 2 hours 3rd day; Magistrate Holter.

***Martin v. Mountain West Farm Bureau Mutual Ins.*, CV 96-138-GF, 10/22/97.**

Larry Grubbs, Billings, for Martin; Randall Nelson (Nelson Law Firm), Billings, for Mountain West.

State Trial Courts

VERDICT/SETTLEMENT: $6,779,600 verdict, school fire insurance... all claims including UTPA settled for $7.3 million.

A Havre jury awarded Malta Public School Dist. $5,157,600 against its insurer USF&G for its Junior/Senior High School Complex that was destroyed by fire in 12/95 and 2 others that were slightly damaged (8-4), $1.3 million for contents (9-3), $250,000 for computer hardware (9-3), and $72,000 for computer software (11-1). The parties subsequently settled for $7.3 million including $500,000 for a bifurcated UTPA claim plus payments owed under the policy for coverages which were not part of the suit. The District settled with its insurance agent Phillips Co. Insurance for $30,000 several days before trial.

USF&G wrote a comprehensive policy for the District for 1995, which was purchased through PCI. The policy covered real & personal property in the blanket amount of $8.53 million for 10 listed properties, including the Junior/Senior High Complex. There was separate coverage for other covered losses, including computer hardware & software in the amount of $700,000. Because of the District's concern regarding the amount of coverage in its assessment of its then current limits of insurance, in 5/95 it hired appraiser Randy Robertson, Havre, who appraised the Junior/Senior High Complex at $4.1-4.3 million. According to USF&G, this information was given to PCI which furnished it to USF&G underwriters who relied on it to issue the policy. The District claimed that the Robertson appraisal would not be sufficient coverage for its individual properties. USF&G issued a blanket policy of fire insurance that attached to and covered to its full amount all 10 properties owned by the District subject to a limit of $8.53 million. On 12/24/95 fire totally destroyed the academic portion of the Junior/Senior High. The gym received significant damage but it was disputed as to whether it could have been repaired.

The District hired Edwards Law Firm 48 hours after the fire, and also hired valuation experts. In 2/96 it filed proofs of loss demanding the $8.53 million without any supporting information, which USF&G rejected. Its experts calculated rebuilding costs at $7.2 million. Teachers also provided inventories & values of lost contents ($2.6 million). In 4/96 the District submitted sworn statements in proof of loss and made a demand for policy limits of $8.53 million plus additional coverages available under the policy. It also argued that it had relied on representations from PCI that the policy would include $500,000 coverage for business interruption. The policy contained only $50,000 worth of extra expense and expediting expense coverage. USF&G advanced $500,000 days after the fire, but rejected the District's sworn statements in proof of loss on grounds that they lacked documentation and proper verification.

In 5/96 the District sued USF&G and PCI. It alleged that PCI breached its contract and negligently failed to procure $500,000 business interruption coverage, and committed negligent misrepresentation in supplying false information to the District with respect to the coverages. It asserted that USF&G breached the contract by failing to pay policy limits for buildings & contents and computer hardware & software. The week before trial it settled with PCI for $30,000 and dismissed the negligent misrepresentation claims against PCI and USF&G.

According to USF&G, prior to trial it advanced $4.4 million to help finance a new school then under construction. The new school, which will cost $12.1 million, is twice as large as the old one and includes a gym which will seat 3,000. In 8/97 taxpayers approved a $6 million bond to help defray cost of the new school.

USF&G did not advance any additional monies until 5 months after the fire at which time the District had provided data supporting its claims. USF&G argued at that time that the coverage purchased by the District provided only $4.3 million in property coverage and $350,000 in personal property coverage. USF&G failed to pay any monies for the District's $2+ million in lost inventory until 36 hours before its initial summary judgment argument in 3/97—13 months after the fire. USF&G advanced an additional $1.2 million several days prior to trial on 12/1/97. USF&G maintained that it had made timely payments when adequate documentation was received after Judge Warner ruled that it had an obligation to advance replacement costs before the building and contents were actually replaced.

The District presented evidence in discovery and at trial that replacement cost of the destroyed building and damaged gym was $7,024,093 and replacement cost of contents was approximately $2.6 million. USF&G's experts calculated the cost to rebuild the old school and repair the gym at approximately $4 million and submitted-contents loss at $1-1.5 million.

Warner denied USF&G's and PCI's motions for summary judgment on the District's claim for breach of an oral contract to procure business interruption insurance, as well as USF&G's motion for summary judgment on the District's claim for breach of contract, or in the alternative, for an order enforcing the appraisal clause in the policy. He also denied USF&G's and PCI's motions for summary judgment on the District's negligent misrepresentation claim.

Warner found that USF&G had not breached the contract concerning payment of the $3.1 million actual cash value of the burned building. However, he noted that there was a dispute about the meaning of policy language and dollar amount of replacement value which should be determined by the jury. USF&G argued that the contract stated that replacement cost was not due until the school and its contents were actually replaced, while the District contended that full replacement value was due since it was clear that it was rebuilding the schools and the cost of replacement exceeds coverage under the policy.

Warner determined that post-litigation conduct of an insurer can form the basis of a UTPA claim.

Warner granted USF&G's and PCI's motion to stay and bifurcate the **UTPA** claims, for hearing by 2 separate juries within 60 days. The Supreme Court ruled on supervisory control that the contract and **UTPA** claims could be bifurcated but must be tried before 1 jury seriatim. The first trial would involve only the insurance contract and the second would involve the statutory claims under **UTPA** (MLW 6/7/97:1).

The District also requested supervisory control regarding USF&G's designated **bad-faith** expert Robert Emmons, arguing that his appearance and testimony should be disallowed because attorney testimony in a **UTPA** trial is prohibited. The Supreme Court denied supervisory control (MLW 10/25/97:2).

Warner ordered that since only 1 jury would hear both cases, seriatim, voir dire would take place in both cases at the outset. USF&G unsuccessfully resisted the joint voir dire and its motions for mistrial were denied. Warner also dismissed the 2 alternate jurors after the first trial since they had not deliberated in the first verdict.

Trial was moved from Phillips Co. (Malta) to Hill Co. after Warner granted Defendants' motion for change of venue to avoid adverse publicity and a potentially biased jury.

The District stated that it is "delighted with the verdict of $6.8 million on the contract claim and $500,000 settlement on the **UTPA** claim since it grossed $1.3 million more than its insurer steadfastly offered prior to trial."

USF&G stated that it was likewise satisfied with the verdict since it was $1.7 million less than the policy limit which the District had insisted upon from the date of the fire.

Plaintiff's experts: architects Terry Sukut and Dennis Powers, Billings; adjuster Larry Reed, Billings.

Defendants' experts: appraiser Randy Robertson, Billings; building cost estimator Harvey Morrison, Spokane; contents appraiser John Kruzinski, Portland.

Demand, $10 million; offer, $6 million+ (also, $6 million offer of judgment). Jury request, $9.6 million on contract claim.

Jury deliberated 4½ hours 5th day.

Malta Public School Dist. v. USF&G and Phillips Co. Insurance Agency, **Phillips DV 96049, 12/5/97.**

Clifford Edwards & Roger Frickle (Edwards Law Firm), Billings, for the District; Steven Harman & Guy Rogers (Brown, Gerbase, Cebull, Fulton, Harman & Ross), Billings, for USF&G in the contract case; Dolphy Pohlman & Marshal Mickelson (Corette, Pohlman & Kebe), Butte, for USF&G in the UTPA case; Carolyn Ostby (Crowley, Haughey, Hanson, Toole & Dietrich), Billings, for PCI.

SETTLEMENT: $52,500, rear-end auto, 3 Plaintiffs, soft-tissue, bad faith.

Sylvia DuVall, her sister Sharon Davis, and Davis's daughter Jodie Prates were injured in 1/97 when Sylvia's husband Michael, driver of their vehicle, rear-ended another vehicle near Laurel. They suffered soft-tissue injuries and treated primarily with a chiropractor. Medicals were $1,573 for Sylvia, $1,356 for Jodie, and $1,985 for Sharon. Prates was in her early 30s; the others were in their 40s.

On 9/9/97 Plaintiffs notified DuValls' insurer Hawkeye Ins. of attorney representation. On 10/3/97 they made demand on Hawkeye to pay medicals pursuant to med-pay coverage. After receiving no response a second demand was made 11/10/97. Hawkeye again failed to respond. Suit was filed 11/25/97 against Michael DuVall for PI and Hawkeye for **bad faith**. Prior to filing its answer Hawkeye agreed to pay $52,500 to settle all claims.

***DuVall, Prates, and Davis v. Hawkeye-Security Ins. and DuVall*, Yellowstone DV 97-1039, settled 1/14/98.**

Scot Schermerhorn (Edmiston & Schermerhorn), Billings, for Plaintiffs.

Federal Trial Courts

INSURANCE: Claims file in first-party underinsurance bad-faith suit not protected by work-product or attorney-client privilege where insurer's lawyer has become expert witness... $25,000 liability settlement, $150,000 underinsured motorist settlement... Hatfield.

Peggy Dion was injured when her brother's vehicle in which she was riding was struck by Bobby Cole. Cole was insured by Western Agriculture. Dion and her husband were insureds under a Nationwide policy. Dion settled with Western for $25,000 and sought underinsured benefits from Nationwide. Nationwide denied coverage, and Dion sued for a declaration of the scope of her coverage and asserted **bad faith** claims. This Court held that the Nationwide policy provided underinsured motorist coverage to Dion (MLW 8/16/97:5). The declaratory judgment portion of the suit was subsequently settled in 6/97 for $150,000. In 7/97 Nationwide listed its lawyer Paul Meismer as its expert regarding insurance law, **bad faith**, and **unfair trade practices**. Meismer was granted leave to withdraw as counsel for Nationwide. Dion moved to compel production of Nationwide's claims file and the Court ordered that it be submitted in camera. Nationwide resists production, asserting attorney-client privilege and/or the work-product doctrine. It maintains that material generated after 10/1/95, the date that Dion first threatened to file a **bad-faith** suit, was prepared in response to a clear threat of litigation and not in the ordinary course of business with a general anxiety of potential litigation.

Assuming that it was prepared "in anticipation of litigation," the dispositive issue is whether Dion has established the requisite need and hardship to compel production of the work product in Nationwide's claims file. In order to prevail under the **UTPA**, Dion must establish that Nationwide lacked reasonable justification for refusing to pay her claim for underinsured motorist benefits. Accordingly, the nature of her claim necessarily places the strategy, mental impressions, and opinions of Nationwide's agents directly in issue, and creates a compelling need to discover the full context in which they handled the claim. The ordinary and opinion work product of the agents are clearly discoverable. In addition, in naming Meismer as an expert, Nationwide has waived the right to assert the work-product privilege with respect to the rest of the claims file. Without such discovery Dion will be unable to ascertain the basis on which Meismer's opinions are based, thereby impairing her ability for effective cross-examination on crucial issues. Accordingly, Dion's motion to compel is granted as to documents in the in camera submission to which Nationwide has asserted the privilege of ordinary and opinion work product.

Dion's **bad-faith** suit does not by itself abrogate Nationwide's right to claim attorney-client privilege pertaining to communications generated in relation to the underlying claim. However, the privilege may be waived if a party "injects into litigation an issue that requires testimony from its attorneys or testimony concerning the reasonableness of its attorneys' conduct." *Thornton* (2nd Cir. 1992). A privilege may also be impliedly waived where a party "asserts a claim that in fairness requires examination of the protected communication." *Bilzerian* (2nd Cir. 1991). The doctrine of implied waiver reflects the notion that the attorney-client privilege was intended as a shield, not a sword. If Nationwide were to assert advice of counsel all communications with its lawyer would clearly be discoverable. It maintains that it will not assert advice of counsel as a defense to Dion's claims. Nevertheless, its decision to name Meismer as an expert speaks volumes about the posture of its defense. Moreover, irrespective of its legal defenses, Dion's case will perforce place at issue Meismer's handling of the underlying claim. To let Nationwide offer his conclusions and expert opinions where they would serve its purposes, without permitting Dion access to all communications between him and Nationwide, would unduly prejudice her. Nationwide, upon naming its lawyer as an expert, assumed the risk that any subsequent invocation of the attorney-client privilege would be abrogated. Accordingly, communications between Meismer and Nationwide, up to the time the underlying claim was settled, should be made available.

***Dion v. Nationwide Mutual Ins.*, 23 MFR 78, 2/9/98.**

Patrick McKittrick & Timothy McKittrick (McKittrick Law firm), Great Falls, for Dion; Maxon Davis (Davis, Hatley, Haffeman & Tighe), Great Falls, for Nationwide.

BENCH JUDGMENT: $200,000 for breach of insurance contract to indemnify bar for alcohol-related finger amputation judgment... bad-faith claims rejected, no duty to investigate or defend, no punitives... Molloy.

In 10/93, Lee Troutt, on behalf of his wife Peggy's Little Joe's Tavern, organized patrons to split wood for the bar. He offered free beer to several patrons including Terry Engstrand and a reduction in bar tabs for others. Engstrand placed blocks on end under the bucket of a front-end loader brought in from a paving project by A-1 Paving foreman Gary Keeper. Because of the size of the bucket Keeper was unable to see the person who was placing or turning the block so Troutt signaled Keeper when it was safe to drop the bucket. At noon the participants took a break and drank a pitcher of beer provided by Little Joe's. About an hour later Troutt signaled to drop the bucket before Engstrand's hands were clear. The bucket amputated most of his fingers. The tavern had a liquor liability policy with $150,000/ $300,000 limits from Colorado Western Ins. It had no general liability policy. In 11/93 the bar's lawyer Thomas Bostock notified Colorado of potential claims by Engstrand. Peggy Troutt informed Crawford investigator Charles Keady that 1 beer had been consumed by participants of the splitting project before the accident, but made no suggestion that sale, service, or furnishing of alcohol was the cause of the accident. Keady did not interview other than Peggy and Lee and did not determine whether any other alcohol had been consumed earlier in the day or the night before. He concluded that there was no coverage. In 6/94 Crawford notified the insureds that Colorado denied coverage. In 6/95 Engstrands sued Troutts and others in Lincoln Co. State Court. The complaint did not allege that his injuries arose out of selling, serving, or furnishing alcohol. In 3/96 Peggy Troutt demanded defense and coverage for the allegations in the complaint. Colorado denied coverage and duty to defend. Also in 3/96 Engstrands asserted coverage under the policy and offered to settle for $150,000 policy limits.

At the State Court bench trial Peggy Troutt admitted liability after the first fact witness had testified. Judge Prezeau proceeded with a hearing on damages. Although he heard little or no evidence on the question he made detailed findings about liability, including that: "At one point prior to the accident, *the men* took a break and drank a *pitcher of beer* provided by Little Joe's." He concluded that "the accident arose, at least in part, from the tavern's business of serving alcohol." The suggestion that the men had a pitcher of beer is dramatically different from the proof presented at this trial. The 2 principals involved in chopping off Engstrand's fingers clearly were impaired by much more than a pitcher of beer. Engstrand's wife Vickie, the bartender the evening before, testified in this case that Troutt had consumed a quart of rum that night and was clearly intoxicated at 2 a.m. and that it was his custom to drink Kamara in his morning coffee. She also testified that Keeper had consumed 15 ounces of alcohol the night before and was clearly intoxicated when he left at midnight. UM pharmacologist/toxicologist Craig Johnston testified that Troutt's alcohol consumption would have rendered him impaired prior to the accident and that the effects of a hangover coupled with 2 mugs of beer before the accident would render him impaired for the purpose of signaling an equipment operator. Prezeau entered $1,145,262 judgment against Little Joe's, including $50,000 loss of consortium by Vickie, setoff by a stipulated judgment in the amount of $835,522 against Keeper and a $16,000 settlement with A-1 (MLW 3/8/97:5). Peggy claims that the judgment resulted in inability to obtain credit. She closed the business. She defaulted on her payments on the bar and it was foreclosed. However, there is insufficient proof that any loss she suffered was caused by Colorado's breach of contract. Her lawyer Donald Shaffer and Lee's lawyer Barbara Benson have not claimed fees.

Colorado had no duty to defend based on the complaint. The judgment, however, awarded damages against the insured for activity that was covered under the policy. The underlying negligent event was caused by the "selling, serving, or furnishing" of alcohol. Therefore, there is a duty to indemnify to the extent of the loss within policy limits. Electing to deny a defense and deny coverage or indemnity places Colorado at risk to pay any judgment covered by the policy, up to policy limits or more if there is **bad faith**. Had Engstrand's lawyers amended to make the liquor liability allegation, even frivolously, and had Colorado nonetheless continued on its same course, the outcome here would be dramatically different. But none of the evidence presented to me was developed by Engstrand's counsel nor was it made known to Colorado until discovery in this case.

The initial facts available to Colorado indicated that coverage was not available. Based on those facts it was under no duty to investigate the entire underlying claim and did not breach the implied covenant of good faith.

Peggy Troutt is entitled to $200,000 for Colorado's breach of contract ($150,000 policy limits for Terry Engstrand's damages and $50,000 for Vickie's consortium award) plus 10% interest from the date of Prezeau's judgment to date of this judgment plus costs. Judgment for Colorado on the **bad-faith** and punitives claims.

***Troutt (Little Joe Montana) v. Colorado Western Ins.*, 24 MFR 218, 11/12/98.**

Monte Beck (Beck Law Offices), Bozeman, for Troutt; John Gordon (Reep, Spoon & Gordon), Missoula, for Colorado Western; Joe Bottomly (Bottomly Law Offices), Kalispell, and Douglas Phillips (Hay & Phillips), Bellevue, Wash., for Engstrands in the underlying case.

INSURANCE: "Fraud and or malice" instruction... judge's answer to jury query not outside influence justifying affidavits... verdict of $15,000 compensatory damages, 0 punitives affirmed... Lympus affirmed.

Linda Sandman was injured and her infant son died in an auto accident involving an uninsured motorist. she sued her insurer Farmers alleging breach of contract, unfair settlement practices, fraud, and negligent infliction of emotional distress in connection with her UM claims. Following commencement of litigation Farmers paid $100,000 policy limits to Sandman and $100,000 policy limits on behalf of her son. With her breach of contract claims thus settled she amended to name Farmers' adjuster Keith Booth as a defendant. The case was tried on Sandman's remaining claims. Question 5 of the verdict form asked: "Do you find by clear and convincing evidence that Defendants acted either fraudulently and or with malice?" This was nearly verbatim to that proposed by Sandman except that the slash had been deleted from the "and/or." During deliberations the foreman sent out the query: "Do we have to differentiate between fraud and malice in #5." Judge Lympus responded, "No." The Missoula jury found that Booth or Farmers had engaged in unfair settlement practices and fraudulent conduct but did not negligently cause Sandman to suffer emotional distress, and awarded $15,000. It answered "no" to Question 5. When polled, each juror stated that he or she had voted "no" to Question 5. Sandman subsequently submitted affidavits of 8 jurors who stated that based on Lympus's answer to their query they had to find that at least one defendant had acted both fraudulently and with malice, and asked Lympus to order that the answer to Question 5 is "yes," set aside the verdict on Question 5, enter judgment against Farmers and Booth on punitives, or grant a new trial on punitives. Farmers and Booth submitted affidavits from 5 of the 8 jurors from whom Sandman had obtained affidavits plus 4 more stating that they would not have awarded punitives. Lympus ruled that the affidavits were not proper as the jury had not been subject to external influences, there was conflicting evidence on matters that would have supported punitives, and both parties had participated in formulating the verdict form and neither had objected to the answer to the query. Sandman appeals.

Aside from observing that the conjunctive-disjunctive reflects poor draftsmanship and generally should be avoided, we are unpersuaded that "and" and "or" with the slash is any more correct or less confusing than without it. In any event, it was not only proposed by Sandman in her proposed form but was not objected to by her in the submitted form.

Lympus correctly ruled that his answer to the query was not an outside influence on deliberations causing confusion and mistake within the meaning of Rule 606(b) and that the affidavits were therefore improper.

The verdict to not award punitives is supported by substantial evidence. There was ample conflicting evidence as to whether Defendants made false representations, concealed material facts, intended to injure Sandman, or acted with actual fraud or actual malice as defined by §27-1-221(2) & (3). Sandman testified that Booth told her that he had been authorized to offer policy limits of $100,000 on her claim but that he did not have policy limits authority on her son's claim, and that he could pay up to $50,000 on her son's claim but could arrange for a structured settlement of $100,000. She contended that this was evidence of misrepresentation and fraud because he in fact then had policy limits authority on both claims. Booth denied telling her that he did not have policy limits authority on her son's claim or that Farmers would only offer $50,000 on it, and testified that he told her that he had authority to settle her claim for $100,000 and had the authority to settle her son's claim but did not mention a specific amount on it. It was within the jury's province to find sufficient evidence of fraud by a preponderance of the evidence but yet not the clear & convincing evidence necessary to award punitives.

Nelson, Turnage, Leaphart, Hunt, Regnier.

***Sandman v. Farmers Ins. Exchange and Booth*, 98-289, 11/24/98.**

Daniel Hileman (Kaufman, Vidal & Hileman), Kalispell, for Sandman; Shelton Williams (Williams & Ranney), Missoula, for Defendants.

VERDICT/SETTLEMENT: $72,783 compensatory, $1.1 million punitives, work comp bad faith... settled for $1.5 million minutes before punitives verdict.

A Great Falls jury found 10-2 that National Union Fire Ins. of Pittsburg and Constitution State Services refused to pay Mary Stormont's temporary total work comp benefits without conducting a reasonable investigation based on all available evidence, 8-4 that they neglected to attempt in good faith to pay her benefits promptly, fairly, and equitably when liability was reasonably clear, 9-3 that they failed to promptly pay her benefits after liability became reasonably clear in order to influence settlement of other benefits, 9-3 that they did not have a reasonable basis in law or fact for contesting the claim, and 12-0 that their conduct was a cause of damage to her. It awarded $22,444 TTD benefits and $50,339 for all other damages (9-3), and found that Defendants acted with malice and should be assessed punitives (9-3). Shortly before the jury returned Defendants requested a demand. Plaintiff demanded $1.5 million. The Bailiff then announced that the jury had reached a decision. Defendants then accepted Plaintiff's $1.5 million demand. Minutes later the jury returned and announced its verdict of $600,000 punitives against National Union and $500,000 against CSS. The jury was dismissed and the settlement was put on the record.

Stormont, 46, was injured while working as a nurse at Livingston Convalescent Center in 10/93. Chiropractor David Thiry recommended that she take a few days off. At LCC's request he released her to light work. Defendants contended that she returned to work and exceeded the doctor's and LCC's light duty restrictions without telling LCC. She worked 3 days at what she contended was required heavier patient care and which LCC contended was light work. A week after her injury she requested a change to the evening shift and a leave in 2 months. The next day she failed to appear and supervisor Cathy Bouse called her at home and told her to come to work because she was scheduled that day. Stormont responded that she was not scheduled and could not work because of pain and medication. Bouse told her to come in or she would no longer work at LCC. Stormont replied that she was not coming in, "I guess you have to send me my check." Defendants called this a resignation; Stormont called it a termination. Stormont returned to Thiry who told her that her injury had been aggravated by her work and that she should stop work completely. Stormont provided CSS a blanket medical release at the request of adjuster Diane Nelson. She then saw Matthew Thiel about a possible wrongful discharge claim. Thiel filed a work comp claim for her. On her claim form and to Thiry she claimed that LCC had ignored Thiry's restrictions and forced her to do her normal job. Thiel provided a report from Thiry stating that Stormont was TTD 10/93-2/94. Defendants contended that Thiry's conclusion that Stormont was TTD was based on the alleged unavailability of light work. Nelson testified that she was advised by LCC that Stormont could do light work and that light work was available, and that Stormont was not required to do light work. Nelson determined that Stormont's wage loss was due to quitting and that no TTD was owed because Stormont had been released to light duty but chose not to work.

At Nelson's request Thomas Marra reviewed the file and recommended denial of benefits, concluding that her wage loss was not due to her injury and there was insufficient disability for temporary total. Stormont saw orthopedist Jeffrey Hansen who recommended no bending, stooping, or lifting, but that she should get back to an active, productive lifestyle. Sara Sexe of the Marra Firm requested and received files on Stormont's 2 previous comp claims, Thiry's charts, and, through investigator Richard DeSilva, a copy of Stormont's personnel file, including her written statements regarding the injury and termination. In 1/95 Sexe wrote to Thiel that the investigation was complete and the claim was denied. A DLI mediator recommended payment of temporary total. Sexe rejected the recommendation. Hansen saw Stormont again and recommended that she not return to work without medical approval. In 9/95 Thiel associated Steven Fletcher who filed a Comp Court petition. In response to Hansen's recommendation that Stormont not return to work without medical approval Nelson requested an IME from occupational medicine specialist Gary Rapaport who concluded that Stormont had been TTD until MMI in 9/95, assessed a 5% whole person impairment, and concluded that all prior back injuries were MMI before her 10/93 injury. After the IME Stormont was paid around $11,000 in undisputed PPD. Defendants argued that in early 1996 LCC informed Nelson and Sexe that Stormont's supervisor had lied about the circumstances of the termination and that Stormont was setup to be terminated. Defendants also contended that LCC then demanded that settlement of the comp claim be stalled and that Nelson and Sexe refused to stall and deny settlement authority. The comp claim settled for $45,160 in 3/96, including $18,824 TTD. Stormont then sued National Union and CSS alleging violations of §§ 33-18-201(4), (6), and (13) (failure to investigate, failure to settle, and leveraging).

Defendants argued that their information from the employer was that light work was available which Stormont could perform and that she had quit and therefore under §39-71-701(4) was not entitled to TTD. Stormont argued that light duty was not an issue because Thiry wanted her off work entirely, and that in any event her termination made light work no longer available so TTD should have been paid.

Stormont testified that in order to survive she was forced to sell her horses and pickup, cash in her life insurance, and subdivide 10 acres on which she had intended to retire. She testified that she took an antidepressant shortly after her termination and again for 20 months prior to settlement of her comp claim.

Marra testified by video that "at this time I

would say probably 50% of my practice is plaintiff's work and 50% of my practice is doing defense work" and therefore "I think I maybe have a little bit more empathy for both sides' position in the case." Stormont responded with evidence that Marra had represented the insurer in 16 of 16 Supreme Court comp decisions and, in the past 10 years, 43 of 44 Work Comp Court decisions. Defendants contended that Marra was referring to his practice now, not in past years.

Judge Johnson ruled before trial that Stormont could not recover additional TTD, but allowed her to seek recovery to simplify the appeal, although the portion of the damage award attributable to such benefits ($26,000) would have been stricken from the verdict.

Plaintiff's experts: attorneys Norman Grosfield, Helena, and Tom Lewis, Great Falls (comp law); adjuster Charles Edquist, Helena; Pamela Heibert, Bozeman (internal medicine, video).

Defendants' experts: attorney Robert Sheridan, Missoula (comp law); retired claims supervisor Sonny Carlson, Rollins.

Demand, $100,000; offer, $50,000. Jury request, $97,000 compensatory, $1.5 million punitives against each defendant; jury suggestion, $35,000-$45,000 if liability found.

Jury deliberated 4 hours 6th day on compensatory damages, 3 hours 7th day on punitives.

***Stormont v. National Union Fire Ins. of Pittsburg and Constitution State Services,* Cascade ADV 96-720, 4/20/99.**

John Morrison (Meloy & Morrison), Helena, and Matthew Thiel (Smith & Thiel), Missoula, for Stormont; Allen Lanning & L.D. Nybo (Conklin, Nybo, LeVeque & Lanning), Great Falls, for Defendants.

VERDICT: Defense, insurance bad faith.

A Kalispell jury found that Metropolitan Property & Casualty Ins. had a reasonable basis in law or fact for contesting Brian & Ellie Barnett's auto property damage claim but not their uninsured motorist claim and violated the UCSPA by misrepresenting pertinent facts or policy provisions relating to coverages, but that the violation did not cause them damage. It found that Metropolitan did not refuse to pay their claims without a reasonable investigation or neglect to attempt to in good faith effectuate a prompt, fair, and equitable settlement.

Barnetts' policy had med pay, property, and UM provisions. In 4/97 Ellie was hit by a person who had stolen a vehicle from Ponderosa Motors in Kalispell. She retained Gregory Paskell and filed claims under the 3 coverages. In 7/97 Paskell was terminated and James Moore was retained. Soon thereafter the property damage claim was settled for the $13,600 stipulated value of Barnetts' totaled vehicle. Ellie, in her early 20s, sustained soft-tissue neck and shoulder injuries, psychological damages, and wage loss. Her health care provider's claims were paid pursuant to med pay coverage. In 10/97 Moore demanded $39,500 UM coverage; Metropolitan offered $3,414, explaining that its offer did not include wage loss due to lack of documentation by the employer, and did not include $5,000 previously paid under med pay because of language in the UM portion of the policy that: "Medical expense paid or payable under the automotive medical expenses coverage will not be paid for again as damages under this coverage." Moore objected that Montana law required the UM offer to include the $5,000 medical expenses previously paid. In 12/97 Metropolitan revalued its offer and increased it to $11,000. In 12/97 Moore sent Metropolitan *Reitler* (Mont. 1981), contending that settlement of the UM coverage was essentially subrogation and to not repeat payment of the $5,000 was contrary to *Reitler*. Metropolitan reviewed *Reitler* and took the position that it was not applicable. In 1/98 a non-lawyer litigation specialist in Metropolitan's office concluded that Moore was correct and that the company should offer the $5,000. Metropolitan accordingly increased its offer to $16,000 which Barnetts accepted.

Barnetts sued Metropolitan asserting **bad-faith.** They requested punitives on the basis that even after the decision that *Reitler* applied the company continued to abide by the contrary policy language in handling other Montana UM claims.

Judge Lympus ruled pre-trial that *Reitler* was applicable and Metropolitan therefore could not rely on policy language to the contrary and had to include the $5,000 meds in the settlement, and the jury was so instructed.

No experts.

Plaintiffs' demand in settlement conference with Lee Kaufman in 2/99 $96,000, offer, $4,000. Demand during jury deliberations $50,000, offer $20,000.

Jury deliberated 4½ hours 4th day.

Barnett v. Metropolitan Property & Casualty Ins.,

Flathead DV-98-104A, 5/14/99.

James Moore, Kalispell, for Barnetts; Stephen Berg (Warden, Christiansen, Johnson & Berg), Kalispell, for Metropolitan.

State Trial Courts

INSURANCE RELEASE in exchange for $7,640 waived all claims against underlying auto tortfeasor's insurer... Olson. Settled on appeal for $8,500.

Geoffrey Angel was driving in Colorado during Thanksgiving break from UM Law School in 1997. A Deaton truck driver fell asleep and crashed. Debris littered the highway. Angel drove over a tire causing $3,600 damage to his car. He had to rent a car to complete his trip and later stay in a hotel as he awaited repair of his car in Denver. During previous semesters he had taken overloads and saved money so he could spend his last semester studying international law in Helsinki. The lengthy repairs cost him the opportunity to study for exams in December, allegedly causing undue stress. Upon his return to Missoula he contacted Deaton's insurer Liberty Mutual. Deaton had reported the loss and admitted liability. He attempted to settle prior to departure for Finland in late December, but Liberty did not settle until 2 months after his return from Finland. Because he had to use funds which he had saved for his trip to pay for the repairs and other expenses he had to stay in a youth hostel in a shared room on a day-to-day basis depending on availability and could not afford to travel in Europe during holidays and weekends as planned.

In 6/98 Angel faxed Liberty a demand stating:

> I believe I have approximately $3,000.00 in damages to my vehicle and costs of repairs and further injuries of $4,500.00 due to the lost opportunities abroad and distress this caused me in my exam time. I have also consulted with several attorneys who estimate my damages to be $15,000.00 as a result of Liberty Mutual's **bad faith**. If you would like to settle both my damages due to the accident and the injury Liberty Mutual has caused me due to their failure to make a reasonable timely settlement I will accept $22,500.00 in full and final settlement of all claims against them. Otherwise, I am going to contact an attorney here at the Angel Law Firm and will proceed with a claim against Liberty Mutual for **bad faith**.

Liberty settled by paying $7,640. Angel signed a standard release form which made no specific mention of releasing any **bad faith** claims. He then sought a declaratory judgment that the form did not release Liberty from **bad faith** for delaying the settlement for some 7 months after liability was clear and reasonableness of expenses had been demonstrated. The following is from Judge Olson's order granting summary judgment for Liberty:

As of 6/22/98 Angel had made an offer of settlement very clearly predicated on "full and final settlement of all claims against them." "Otherwise" could only have come into play had there been no settlement of all claims. On 6/29 Liberty wrote to Angel: "This will confirm our settlement. Please read, sign in ink, and return the accompanying release. ... A check for $4,000.00 will also be issued to you." Although Angel had never claimed more than $3,640 in property damages, Liberty paid him $4,000 in addition. The release contains in large type above the signature space the statements: "YOU ARE MAKING FINAL SETTLEMENT" "THIS IS A RELEASE: READ BEFORE SIGNING." Above Angel's signature are his handwritten words: "I have read this release." His brother Christopher, a Bozeman attorney, and one of his attorneys witnessed execution of the release. He executed it on the advice of his brother and his father Charles, also a Bozeman attorney.

The release is not ambiguous: "all other persons, firms and corporations" were released "from all claims and demands, rights and causes of action of any kind the undersigned now has or hereafter may have." It was returned to Liberty without comment from Angel. No indication was manifested that he might later claim that the plainly written release was something other than what its language shows. He accepted Liberty's written counter offer to settle all claims and was paid more than his actual special property damage amounts.

From the oral argument, as well as things filed by Angel in support of his summary judgment motion, it appears that he thinks that any **bad faith** claim must be tried and that such a claim cannot be settled. However, the law favors settlements. There is nothing to indicate that Liberty demanded that he forego a **bad faith** claim as a condition to settlement. Rather, it was Angel who brought up a **bad faith** claim in his 6/29 letter, together with his offer of $22,500 "in final settlement of all claims against them." That letter clearly shows that there would be no **bad faith** claim if there was a full & final settlement of all claims, which is what occurred. The express terms of the agreement control, not Angel's unexpressed latent thoughts. If he did not want to accept Liberty's counter offer for settlement of all claims he should have so informed Liberty and returned the release unsigned. Summary judgment for Liberty.

Angel appealed, raising as issues whether Liberty's paying $7,640 for the underlying claim released its liability for **bad faith** even though it had rejected his offer to settle that claim for an additional $15,000, and whether a written release for PI and property damage between Deaton and Angel can be extended through parol evidence to release an insurer from **bad faith** in settling the underlying claim. Prior to briefing the parties settled by Liberty paying an additional $8,500.

***Angel v. Liberty Mutual Ins.*, Gallatin DV-98-345, Olson's order 2/18/99, settled 5/27/99.**

Geoffrey Angel (Angel Law Firm), Bozeman, and Alan Blakley (Blakley & Velk), Missoula, for Angel; George Goodrich (Garlington, Lohn & Robinson), Missoula, for Liberty.

VERDICT: $15,282, eye scarring from being hit in bar by then county attorney, admitted negligence/-causation. Previous $9,000 dram shop/bad faith settlement.

An 11-1 Libby jury found that Robben Hilton's damages were caused by Charles Sprinkle's admitted negligence in hitting her and awarded $282 for medicals, $15,000 for pain & suffering, and 0 for course of life. It found that Sprinkle's conduct did not cause Hilton severe emotional distress and that punitives should not be awarded.

Hilton, then 40, was hit above her left eye by Sprinkle in the Mint Bar in Libby in 2/96 for no reason. They were both sitting at the bar, with Sprinkle's girlfriend between them. Sprinkle reached across his girlfriend to hit Hilton. Hilton claimed that Sprinkle, then Lincoln Co. Attorney, was so drunk that he was blacking out. The skin on her brow was split and her eye was blackened. She sued Sprinkle alleging battery, negligence, and negligent infliction of emotional distress. She sued the Mint Bar alleging negligence and dram shop violations. She claimed scarring to her eye and permanent injury. She also claimed that the scandal created by Sprinkle's act ruined her life, caused her to move from Libby, and seriously disrupted her life and family. She settled with the bar and its insurer Capital Indemnity (for **bad faith**) prior to service for $9,000 and amended to name only Sprinkle. Sprinkle admitted negligence and causation in his answer but denied the nature and expense of Hilton's injuries and punitives. Hilton dropped her intentional tort claims at the time of the pretrial order.

Sprinkle was charged with misdemeanor assault. Pursuant to a plea bargain he pled guilty to disturbing the peace and resigned as County Attorney and was sentenced to 10 days in jail and fined $100.

Plaintiff's experts: OD Steven Sorenson, Libby; psychiatrist Noel Drury, Kalispell (deposed).

Defendant's experts: counselor Peter Volkman, Libby.

According to Plaintiff: Demand at settlement conference, $19,125 new money in addition to the $9,000 from the bar and its insurer; offer, $5,000 new money. Demand between settlement conference and trial, $35,000 new money; offer between settlement conference and trial, $7,000 new money.

According to Defendant: Demand at settlement conference, $19,000 new money in addition to the $9,000 from the bar; offer at settlement conference, $5,000 new money. Demand between settlement conference and trial, $39,000 new money; offer between settlement conference and trial, $10,000 new money.

Jury request, $30,000 for pain & suffering, $30,000 for emotional distress, $30,000 for disruption of life, $282 stipulated medicals; jury suggestion, $282 medicals and "nominal" amount for pain & suffering.

Jury deliberated 3½ hours 3rd day; Judge Prezeau.

Sprinkle has moved for a pro tanto reduction of the verdict in the amount of the $9,000 from the bar for a net $6,282 based on *Deere* and *Plumb*. Hilton opposes the reduction, claiming in part that settling with the bar's insurer for bad faith had nothing to do with Sprinkle's conduct.

***Hilton v. Sprinkle*, Lincoln Co. DV-98-9, 10/21/99.**

Evan Danno (Danno Law Offices), Kalispell, and Judah Gersh (Gersh Law Offices), Whitefish, for Hilton; Stephen Berg (Warden, Christiansen, Johnson & Berg), Kalispell, for Sprinkle (State Farm Ins.).

Federal Trial Courts

INSURANCE: UTPA claim-denial defense limited to facts known at the time and to law at the time... insurer not limited to reasons in denial letter... conflicting judicial opinions as to coverage not admissible as to reasonableness of denial... Cebull.

Ashland Oil sued Enron (now EOTT) and others in State Court alleging that they had wrongfully injected B-G mix into a common carrier oil pipeline owned by Portal Pipe Line that supplied oil to Ashland's refinery. The parties settled. Enron's primary insurer Travelers Indemnity contributed to the settlement but its excess carriers did not participate in the settlement or contribute to it. EOTT alleges breach of contract and violation of the UTPA by the excess carriers. In 1988 J. Winowiecki, claims attorney for certain Defendants, wrote to Enron stating the reasons for denial of coverage, mainly that "Ashland Oil's claim [was] primarily for the price differential between what was paid [by Ashland] ... and what was actually injected into the Portal Pipeline.... Ashland is seeking restitution from Enron ... for the unjust profits [Enron] gleaned from the injection...." According to the letter (and Defendants), such claims did not fall within the coverage provided. The letter stated that denial was also based on an "'Industries, seepage, Pollution, and contamination clause,' for any property damage caused by contamination." Judge Hatfield, predecessor to the undersigned as trial judge in this case, ruled that the pollution exclusion did not excuse coverage, but that Montana's public policy barring recovery for an insured for its own intentional acts relieved Defendants from a duty to indemnity EOTT. The 9th Circuit agreed that the pollution exclusion gave Defendants no assistance, but reversed as to the intentional act/public policy issue, concluding that because Ashland's complaint stated claims for negligence, strict liability, and intentional torts EOTT was entitled to prove that the negligence and strict liability claims were a major factor and the intentional act claims were a minor factor in arriving at its settlement payment (MLW 1/3/98:6). Because recovery for negligence and strict liability is not barred by public policy, the Court remanded to let EOTT show that the settlement was based on those claims. Defendants request summary judgment on the UTPA claim and EOTT has related motions in limine.

Defendants ask the Court to rule as a matter of law that they had a reasonable basis for denying EOTT's claim. EOTT argues that Defendants, in proving their reasonable basis defense, should be precluded from utilizing facts not known to them when they denied coverage. MCA 33-18-242(5) suggests the limited approach; it frames the defense as whether "the insurer **had** a reasonable basis in law or in fact for contesting the claim." Further, because the UTPA establishes a duty to "conduct a reasonable investigation based upon all available information," it would subvert the policy behind it to let an insurer promptly deny coverage, perform little or no investigation, and then later justify its decision with later-obtained information. The Montana Supreme Court has not been faced with this precise question. However, law from other jurisdictions supports EOTT's position and this Court is convinced that the Montana Supreme Court would follow that rule. *Klaudt* (Mont. 1986) stated, as to whether an insurer's duty to negotiate in good faith arises only when liability has been legally determined, that "the jury must determine whether in insurer negotiated in good faith given the facts it had then." It is logical to conclude that a similar limitation should apply to an insurer's defense of its denial of a claim. Accordingly, Defendants shall be limited to facts known to them at the time they decided to deny coverage. Defendants argue that such a limitation will unjustly prevent them from presenting post-denial evidence that EOTT submitted a false claim. However, had they been able to show in response to EOTT's motion for summary judgment on the coverage issue that it had made a false claim this Court would have found that there was no coverage, and where there was no coverage there is no bad faith. But they did not prevail on coverage, and they may not now resurrect their false claim allegations by using after-acquired evidence. However, depending on the circumstances, they may be able to use after-acquired evidence to impeach a witness.

Defendants are also precluded from relying on cases published after they decided to deny coverage. In addition to the statutory language "had a reasonable basis in law" suggesting a time limitation, "the insurer's intent at the time the insurer acted does not magically change simply because of a later determination or belief that coverage was not in fact required. Such bad faith conduct cannot be excused by the discovery of a case that provides an insurer with an after-the-fact justification for its prior behavior." *Aceves* (S.D. Calif. 1993).

Defendants are not estopped from asserting legal grounds for denial that were not stated in their denial letter. *Portal Pipe Line* (Mont. 1993) settled a similar issue although in the context of a coverage action. While recognizing that an insurer has a duty to inform the insured of all policy defenses that it intends to rely on, the Court found that estoppel should not apply unless the insured has been prejudiced by the newly asserted grounds for denial, and held that the insurer had not waived its later-asserted defenses because no prejudice had been shown by Portal because as an excess insurer the insurer had no duty to defend and no defense had been assumed. The facts are nearly identical in this case (*Portal Pipe Line* arose from the same underlying action).

The conflicting opinions of Hatfield and the 9th Circuit on coverage may not be utilized by either party as evidence of Defendants' reasonable or unreasonable basis for denying EOTT's claim. As stated by *FRI Holdings* (Cal. Ct. App. 1999), "surely the starting point in any bad faith analysis is that judges are presumptively reasonable people, and if they, acting in a judicial capacity, conclude that an exclusion applies, it means that an insurer who concludes the same thing also acted reasonably."

However, this Court must follow the rule as stated in *Walker* (Mont. 1990), where the district court granted summary judgment for the insurer as to coverage, finding that he insured's claim was time-barred. The Montana Supreme Court reversed, concluding that filing of the administrative claim sufficed. On remand the insurer moved for summary judgment on the bad faith claim, arguing that "a reasonably debatable issue regarding coverage had been established by the opposing rulings of the District Court and the Supreme Court." The Supreme Court reversed "because of the presence of issues of material fact" relating to bad faith allegations. One aspect of this is troubling. As has been clearly established in subsequent cases, if an insurer can establish a reasonable basis for contesting the claim the insurer has a complete defense, even if violations have been proven and even if fraud or malice has been shown. Thus a fact issue regarding acts of bad faith seems irrelevant to whether the insurer may establish a complete affirmative defense. To illustrate the logical flaw, imagine precluding summary judgment on a statute of limitations defense because there are fact issues regarding liability. Perhaps *Walker* was suggesting that a judge's opinion on coverage, later reversed, may simply never serve as per se proof of the insurer's reasonable basis. Nonetheless, it is clear that in Montana the issue of whether an insurer had a reasonable basis for denying a claim may not be decided as a matter of law, no matter that the trial court found that there was no coverage.

Defendants argue that they have shown a reasonable basis for contesting EOTT's claim, on the basis of Hatfield's 6/1/99 order (MLW 6/12/99:4) concluding that it is not entitled to recover from Defendants that amount contributed by Travelers Indemnity. They argue that the order proves that they were not only reasonable, but also correct, and that if they were correct in denying part of the claim they were reasonable in denying it all (they also argue that they only disputed the amount of the claim, not the entire claim). However, for the same reasons discussed above, the order may not serve as evidence of reasonableness. Further, the order does not operate as "law of the case" in the manner Defendants wish it to. Outside of a handfull of cases where intent of the insured's actions underlying its claim was proven as a matter of law by virtue of criminal proceedings against the insured, the Montana Supreme Court has consistently held that whether an insurer had a reasonable basis to deny coverage is a fact issue not generally subject to summary judgment or directed verdict. This rule shall apply here. Defendants' disingenuous argument that they contested only the amount but not the entire claim is merely word play. A glance at their denial letter belies their assertion. The bad faith claim will go to the jury.

***EOTT Energy Operating LP v. Certain Underwriters at Lloyd's of London et al*, 25 MFR 161, 8/10/99.**

Glenn Tremper & Jean Faure (Church, Harris, Johnson & Williams), Great Falls, for EOTT; Jack Lewis & Patrick Watt (Jardine, Stephenson, Blewett & Weaver), Great Falls, and Joseph Winowiecki (Mendes & Mount), NYC, for Defendants.

VERDICT: Defense, insurance bad faith (follow on above, not reported in MLW).

Magistrate Cebull directed verdict for Defendants at the conclusion of the bad-faith trial 10/27/99 because EOTT failed to prove actual or compensatory damages. The Court will also enter judgment for Defendants for failure of EOTT to set forth a prima facie case for punitives. Even had the Court found that EOTT had a basis for actual or compensatory damages, the Court would not have allowed punitives to go to the jury. The only evidence that EOTT presented that would have allowed punitives to go to the jury was the fact that Mr. Winowiecki was "rude," "mad," or "arrogant" at the *Ashland v. UPG* pre-settlement conference in 11/98. This does not rise to the level of a prima facie case for punitives under Montana law. MCA 27-1-221.

VERDICT: $1,179 compensatory damages, no punitives, insurance bad faith... $12,500 settlement of underlying UM/med pay claims.

A Billings jury found that National Insurance Association violated the UTPA in connection with UM and med pay claims by Holly Flamm but that adjuster Erik Scott did not violate the UTPA with such frequency as to indicate a general business practice. It awarded Holly $300 and her mother Rae $879 compensatory damages. 10 jurors found that NIA's conduct amounted to malice such as to make it liable for punitives and 2 found that it did not. The form required a unanimous vote on punitives. After the case was argued and submitted the parties reached a confidential settlement which included certain conditions subsequent dependent on the verdict. Neither side will appeal.

Holly, a minor, was injured in an accident caused by the negligence of an uninsured motorist in 9/96. She incurred $5,640 medicals and fully recovered. NIA had issued a policy to her mother which included UM and med pay coverages. Rae retained Bruce Lee who wrote to her agent to make a claim against the UM and med pay coverages. The claim was assigned to Scott. Unsatisfied with handling of the claim, Lee sued NIA and Scott. NIA then settled the UM and med pay claims for $12,500. Flamms pursued their **bad faith** claims, asserting as damages loss of time value and use of money, annoyance, worry, credit impairment, and stress of litigation.

Judge Colberg admitted, over Defendants' objection, evidence of other claims unrelated to Flamms' claims, to show common business practices and malice. He excluded Flamms' expert Charles Cashmore, Billings, finding that pursuant to *Hart-Anderson* (Mont. 1978) an attorney could not offer legal conclusions and his testimony would not assist the jury.

No experts.

Demand prior to trial, $375,000; offer during trial, $20,000. Jury request, $3,500 and a finding of malice in support of punitives; jury suggestion, $0.

Jury deliberated 4½ hours including dinner 4th day and 5 hours 5th day.

***Flamm v. National Insurance Association and Scott,* Yellowstone DV 97-834, 11/12/99.**

Bruce Lee, Billings, and Gayle Stewart, Billings, for Flamms; Kent Koolen (Moulton, Bellingham, Longo & Mather), Billings, for NIA; James Walen (Stacey & Walen), Billings, for Scott.

VERDICT: Mixed, hail damage, bad faith.

A 12-0 Billings jury rejected George Rowton and ex-wife Connie Warren-Rowton's claims against Fire Insurance Exchange for breach of the **UTPA and bad faith** and denied them recovery of $28,000 in hail damages which they claimed in excess of $8,800 advanced by FIE at the time of the storm in 1996. It also rejected FIE's counterclaims against Rowton for cancellation of the policy and recoupment of the $8,800 based on alleged misrepresentation and deceit.

The $8,800 was advanced by an independent agent for a company that Farmers Ins. generally utilized to adjust damage from large storms. It represented payment for spot repairs and re-staining of Rowtons' roof and replacement of other items. Rowtons subsequently sought additional money under their "replacement cost" coverage for a $12,000 bid for replacement of the roof and $14,900 for damage to the rest of their house. Farmers' adjusters, working for FIE, raised questions about repairs to the roof following payment of $12,000 for roof damage sustained in a 1991 storm. Ultimately, Farmers and FIE maintained that Rowtons misrepresented the extent of repairs made following the 1991 storm. FIE's claims for misrepresentation in the application process were dropped before trial, but it argued that misrepresentations in the claim process were grounds for cancellation of the policy under the Fraud and Concealment clause and denied liability for additional payments.

Rowtons argued that a "restriction" that had been issued on the policy because the roof had only been repaired and not replaced did not apply to their 1996 policy because from 1994 to 1996 they had switched to State Farm and no restriction had been placed on the 1996 policy when it was issued. Farmers discovered, however, that Mrs. Rowton had issued the policy to herself while employed at the Wallinder Ins. Agency.

Rowtons sued FIE on the contract for fraud and under §33-18-242 and sued Farmers for common-law **bad faith**. FIE denied the claims, affirmatively alleged that Rowtons had made material misrepresentations in the claims process, and counterclaimed alleging deceit. Judge Colberg granted summary judgment on the fraud claims since it was undisputed that Mrs. Rowton was the only one involved in the sale of the policy to herself and her husband. He directed verdict for Farmers for failure to prove a general business practice. He ruled at trial that the §27-1-221(6) requirement for a unanimous verdict on punitives was unconstitutional under Art. 2 §26. He limited FIE's expert Larry Read from expressing any opinions regarding compliance with insurance industry standards or the UTPA and precluded Rowtons from putting on evidence regarding claims settlement practices after the suit was filed.

Plaintiffs' experts: none.

Defendants' expert: Larry Read (Montana Claims Service), Billings (bad faith).

Demand, $30,000; no offer. Jury request, $28,000 for the present cost of hail damage repairs in addition to the $8,800 paid in 1996 plus nominal damages for violation of the UCSPA and unspecified punitives for malice. Mediator, Charles Cashmore.

Jury deliberated 4 hours 4th day.

***Rowton v. Fire Ins. Exchange and Farmers Ins. Group*, Yellowstone DV 97-598, 12/16/99.**

Robert Smith (Cavan & Smith), Billings, for Rowtons; James Jones & Shane Coleman (Dorsey & Whitney), Billings, for FIE and Farmers.

VERDICT: $56,213, rear-end auto, summary judgment on liability, soft-tissue neck/back, headaches.

A 10-2 Havre jury awarded Ellen Adams $56,213 for injuries sustained in a collision with Rex Gulick on Hwy 2 at the Rudyard intersection in 3/98: $12,432 for medicals, $850 for future medicals, $2,931 for travel costs, and $40,000 general damages. Judge Warner had granted summary judgment for Adams on liability. The verdict is subject to offset of $11,560 medicals and $1,324 mileage paid prior to trial.

Adams was in the left turn lane. Gulick, 73, failed to pass to the right in the through lane and rear-ended Adams. Adams suggested highway speeds of 55-60; Gulick suggested 15-20 mph.

Adams, 39, suffered soft-tissue injuries to her neck and mid-back as well as aggravation of a preexisting back condition. She also claimed headaches related to her neck injury. Gulick suggested that her muscle tension headaches were related to life stressors, not the accident. 2 doctors said she was a "symptom magnifier."

Plaintiff's experts: osteopath Patrick Galvas, Great Falls; RN Priscilla Kuka, Great Falls (biofeedback); physiatrist Ronald Peterson, Great Falls.

Defendant's expert: orthopedic surgeon Catherine Capps, Missoula.

All medical testimony was presented by video deposition as a result of judicial continuance of the trial for criminal trials. Jurors discussed medical testimony by video with Warner after the trial. All agreed that they did not like it. Comments ranged from "it sucks" to "we were not able to measure credibility from the television from body language."

Demand, $97,000 including **bad-faith** claim; offer of judgment, $35,000 including medicals/mileage paid. Jury request, $153,071; jury suggestion, $25,000-$35,000. Mediator, Michael Anderson.

Jury deliberated 2 hours 3rd day.

***Adams v. Gulick*, Hill DV-98-79, 2/4/00.**

John Seidlitz, Great Falls, for Adams; Robert James (James, Gray, Bronson & Swanberg), Great Falls, for Gulick (National Farmers Union Ins.).

VERDICT: $210,275 to insurer, arson counterclaim.

A Billings jury found that Colin Todd intentionally caused his home to be burned and that Mountain West Farm Bureau Mutual Ins. was entitled to cancel the policy retroactive to when it was issued because of concealment or misrepresentation of material facts on the application which were not waived, thereby entitling it under its counterclaim to recover $5,000 living expenses paid to Todd, $201,275 it paid to Green Point Mortgage, and $4,000 for debris removal, less the $1,039 premium. It also found that Todd intentionally concealed or misrepresented a material fact or circumstance relating to the proof of loss contents claim, thereby relieving Mountain West of having to pay any compensation for his personal property loss. Judgment was entered for Mountain West for $210,275 and costs with post-judgment interest.

Todd's home in Paradise Valley was completely destroyed by fire 7/1/97. He testified that he was traveling on the West Coast at the time. The fire department concluded that the fire had been electrical. Neither Todd nor Mountain West was notified until 7/31. Adjuster Rick Gaines thereafter noticed that the fire debris was devoid of the usual living contents. He requested a cause & origin investigation. Chris Rallis found the fire to be incendiary in origin and found remnants of 3 gas containers in the hallway and under a staircase next to the garage. Todd admitted removing the sheetrock wall between the garage and staircase for extra storage. A contents search revealed none of the metal items claimed. On 12/23/97 the claim manager stated that the company had no real proof to withhold payment any longer and offered Todd approximately $6,800 for contents in exchange for a release of claims. In 2/98 Todd's claim was denied for material misrepresentation on the application as to his occupation, whether someone would always be present at the home when he was away, and whether he had ever been investigated for criminal activity. The right to contest the claim on grounds of arson was reserved. In 2/98 Mountain West offered to release its counterclaim for the amount paid to the mortgagee ($201,375) in exchange for a release of all claims, additional living expense advanced pending investigation ($5,000), and debris removal ($4,000). Todd sued in 4/98, including alleging **bad faith**; Mountain West counterclaimed for its payments under the policy.

Plaintiff's experts: none.

Defendant's expert: Chris Rallis, Sioux Falls (fire cause & origin).

Demand, none; offer, defense costs 30 days before trial. Jury request, $65,000 plus punitives; jury suggestion, $0.

Jury deliberated 5 hours 5th day; Magistrate Anderson.

***Todd v. Mountain West Farm Bureau Mutual Ins.*, CV 98-66-BLG, 3/10/00.**

Michael Wheat & Julieann McGarry (Cok, Wheat, Brown & McGarry), Bozeman, for Todd; Randall Nelson, Billings, for Mountain West.

SETTLEMENT: $690,000 domiciliary/medicals, $90,000 bad-faith, previous $82,500 total disability.

Allen Haas was injured in 6/90 when a horse rolled on him while he was employed by the Newman Ranch, resulting in mental impairment. He settled PTD and PPD claims for $82,500 in 6/98. The State Fund paid for domiciliary care by his wife Sally at $7/hr, 14 hours per day. Judge McCarter increased the rate to $11 in 6/98 retroactive to 6/97. In 8/95 the State Fund concluded that Haases may be fraudulently accepting domiciliary care benefits based on information that he, inter alia, continued to maintain his outfitter license and reported to the Board of Outfitters that he had guided clients on numerous back country trips. It asked DOJ to investigate. DOJ agent Reed Scott posed as a client on a pack trip. He ultimately concluded that Haas needed daily supervision and that domiciliary care benefits were not being fraudulently accepted. Haas learned of the undercover investigation from a former employee in 12/95. He became upset and experienced adverse emotional & physical consequences. He sued Scott in Federal Court asserting §1983 and state-law claims. Judge Hatfield granted summary judgment for Scott on the §1983 action on grounds that his undercover investigation did not constitute a search for 4th Amendment purposes (MLW 10/2/99:7). He refrained from supplemental jurisdiction over the state-law claims because, inter alia, Haas had instituted a similar action in Teton Co. State Court—a **bad-faith** action against the State Fund. Haas settled the **bad-faith** action for $90,000 in 11/99. He settled his domiciliary care/medicals claim in 10/00 for $690,000 ($252,249 cash, $3,748/mo for life, 12 years guaranteed).

***Haas v. State Fund/Newman Ranch,* stipulated judgment by McCarter 10/27/00; *Haas v. Scott,* 25 MFR 258, summary judgment by Hatfield 9/21/99; *Haas v. State Fund,* Teton 99-DV-2, settlement approved by Buyske 11/16/99.**

David Slovak & Tom Lewis (Lewis, Huppert & Slovak), Great Falls, for Haas; Thomas Martello (State Fund), Maxon Davis (Davis, Hatley, Haffeman & Tighe), Great Falls, and Asst. AG Paul Johnson, for Defendants.

VERDICT: $112,292, DUI auto, 4 plaintiffs, no-defense trial following default against drunk driver, premature contractions/premature births/back/knees/shins/emotional distress... undisclosed settlement of bad-faith/sanctions claims against Plaintiff's UM insurer.

A 6-person Billings jury awarded a total of $112,292 to Sandie Green and her 3 children who were involved in a collision with DUI driver Chad Lapp in 12/98 in Shepherd.

Green was pregnant with twins Chisum and Taylor. She sued Lapp, who was uninsured. Her UM insurer, State Farm, intervened and default was entered against Lapp. Green filed a cross-complaint against State Farm alleging breach of contract and bad faith. State Farm moved to bifurcate, which Judge Fagg denied. After Green's motion to compel, which was granted, she moved for sanctions for discovery abuses. The day after a hearing on the motion for discovery sanctions and Fagg's threat of serious sanctions but prior to issuance of the order, Green and State Farm settled for an undisclosed amount. A damages trial was held before a jury with no defense, resulting in a verdict against Lapp of $50,000 for Green, $3,000 for Fink, $18,458 for Chisum, $20,834 for Taylor, and $20,000 punitives.

Sandie Green, 35, suffered premature contractions, back injury, and emotional distress.

Kara Fink, then 15, suffered bruised knees and shins.

Damages were claimed for Chisum and Taylor for premature birth.

Plaintiff's expert: orthopedic surgeon John Dorr, Billings (deposed).

Demand, $88,500; offer, $13,000. Jury request, $390,720.

Jury deliberated 2 hours 1st day.

***Green and Fink v. Lapp and State Farm Mutual Auto Ins.*, Yellowstone DV 99-1053, 11/13/00.**

Patricia Peterman (Peterman Law Firm), Billings, and Scott Green (West, Patten, Bekkedahl & Green), Billings, for Green; Bradley Luck (Garlington, Lohn & Robinson), Missoula, and Steven Harman (Brown Law Firm), Billings, for State Farm.

Federal Trial Courts

INSURANCE: Failure to make contributory negligence claim in underlying auto death case precludes bad-faith claim... no judicial notice of purported contributory negligence items... judgment as matter of law for insurer... Molloy.

(Judgment as a matter of law was granted in open court at the close of Plaintiff's case, followed by a written opinion.)

Reid Stuart's daughter Rachelle and granddaughter Rhanda were killed in 2/88 while riding in a vehicle driven by Darcy Brazill when Robert Aiken ran a stop sign at I-15 and Hwy 44 near Conrad. Aiken pled guilty to negligent homicide. Both Aiken and Brazill were insured by State Farm. Claims rep Robert Suhr told Stuart shortly after the accident that both Brazill and Aiken were insured by State Farm but that only Aiken's policy would provide coverage for the accident. Stuart testified that he believed that this meant that Brazill was not negligent. Stuart informed his lawyer Gale Gustafson that both Aiken and Brazill were insured by State Farm. Gustafson's subsequent letters to State Farm reflected his understanding that Brazill held a policy with State Farm. State Farm opened and confirmed liability coverage under both policies. Funeral expenses were paid out of Brazill's med-pay coverage. No payments were ever made from her liability coverage. The $4,521 liability reserve on her policy remained in place until 8/89. Stuart sued State Farm alleging UCSPA violations.

Dennis Jupka, State Farm's representative, testified that opening & confirmation of coverage and establishment of a reserve are clerical tasks and do not signify the insurer's belief that the insured has any exposure. Stuart offered to call as rebuttal John Crowe, whom he anticipated would testify that the reserve does not remain open for any significant time unless the insurer foresees exposure. However, Stuart provided inadequate expert disclosure for Crowe, and was precluded at the pretrial conference from calling him. Crowe was also precluded at trial as a rebuttal or impeachment witness. Stuart did not suggest until after Jupka's testimony that he should be permitted to call Crowe in rebuttal, and points to no "changed circumstances" as in *Amarel* (9th Cir. 1997) to justify permitting Crowe to testify despite the previous orders. Therefore, Jupka's testimony is uncontroverted.

In 8 or 9/88 State Farm paid the decedents' estates $100,000 policy limits on Aiken's vehicle.

In 1990 Brazill sued Aiken. Stuart was an intervenor-plaintiff. State Farm retained Lon Holden to defend Aiken. Its answers asserted the affirmative defense of contributory negligence against Brazill, but no proof of her negligence was adduced. In the early stages Holden wrote a memo to Suhr stating his intention to assert the defense. He referred to Aiken's statement that he was told by 2 patrolmen that Brazill was driving too fast and should have had her vehicle under control. Holden also referred to a statement by someone named Forgry to the same effect. However, Stuart did not call Forgry, Holden, or the patrolmen at trial. Aiken and Suhr are deceased. The evidentiary basis of Holden's affirmative defense was not made part of the record in this case.

Stuart asked the Court to take judicial notice of State Farm's answers and Holden's memo as substantive evidence that State Farm believed that Brazill was negligent or as substantive evidence that she was in fact negligent. The evidentiary obstacles to admission of the pleadings are legion. While the fact that Aiken pled Brazill's negligence is "capable of accurate and ready determination, that she was in fact negligent is not. Assertion of the affirmative defense of contributory negligence in a pleading is a legal contention, not an assertion of fact, and so is not a binding judicial admission. Holden's affirmative defense was proffered in a proceeding by Brazill against Aiken, not State Farm. Stuart offered no reason to consider Aiken's position binding on State Farm. Despite his dual representation, Holden's primary duty ran to Aiken, and he was obligated to act in what he perceived as Aiken's best interests. That State Farm paid him does not compel a finding that his positions on behalf of Aiken are binding on State Farm, and in any event Stuart failed to explain how State Farm's purported belief that Brazill was negligent is relevant to his statutory bad-faith claim. State Farm had no duty to alert Stuart to the possibility that he might have a claim against Brazill. "The duty is upon the claimant to file his claim, not upon the insurer to solicit claims." *Grenz* (Mont. 1993). Moreover, MCA 33-18-201 does not apply unless a claim is made. *McNeil* (Mont. 1992).

Uncontradicted testimony shows that Stuart had knowledge of all pertinent facts. He knew that Brazill was driving the car in which his decedents were passengers and that State Farm insured her. If he believed that she might have been negligent he could have brought a claim against her. (For this reason, too, the proffered testimony of Crowe is of questionable value.) There is no suggestion that State Farm prevented him from doing so. Stuart, not State Farm, had a duty to make a claim within the limitations period. He chose not to do so. Absent a claim, State Farm's duties under the UCSPA are not triggered.

Unable to get Aiken's pleadings in *Brazill v. Aiken* admitted, Stuart conceded at the hearing on State Farm's motion for judgment as a matter of law that Brazill's liability was never "reasonably clear." Consequently, as he also conceded, his claims under MCA 33-18-201(6) & (13) cannot be sustained. They would also be precluded by *McNeil's* holding that an insurer's statutory duties are not triggered unless a claim is made. Stuart's claims arose under MCA 33-18-201(1), (6), and (13), none of which apply unless a claim is made. There is no evidence that State Farm's misrepresentations, assuming they existed, prevented Stuart from filing a claim. There is no evidence that a claim could have been sustained even had it been made. No reasonable jury could find that State Farm breached its statutory duties to Stuart.

***Stuart v. State Farm Mutual Auto Ins.*, 27 MFR 453,**

VERDICT: Defense, insurance contract/bad-faith... no new money under UIM coverage following $87,570 liability/med-pay settlement... bad faith adjustment/settlement but no cause of damage.

A Billings jury found 10-2 that Peter Gallogly was not entitled to more money under his Safeco UIM coverage for damages he sustained as a result of Lucille Hill's negligence in an auto collision in 1/98 in Billings above the $87,570 he had already received under her Safeco liability policy and his own med-pay coverage. It found 11-1 that Safeco committed unfair trade practices during the adjustment and settlement of Gallogly's claims but 9-3 that its conduct was not a cause of damage to him. It also found 11-1 that punitives should not be awarded against Safeco, even though it was instructed not to go to that query given its causation finding.

Gallogly, 69 at the time of the accident, suffered degenerative disk disease prior to the accident and had undergone a 2-level cervical fusion 2 years before the accident. Safeco insured Hill with $100,000 liability and insured Gallogly with $10,000 med-pay. It contended that there was a question about whether his symptoms were a result of the accident given his preexisting condition and refused to pay medicals while it investigated. Meanwhile, Gallogly demanded well in excess of Hill's liability limits. Counsel hired by Safeco and Hill's personal counsel both demanded that Safeco not advance-pay medicals under these circumstances because it would potentially impair limits available to settle. Gallogly had insisted that Safeco not pay his medicals out of his own med-pay coverage. In 9/98 Safeco paid the medicals out of his med-pay coverage after receiving his permission. It paid the small balance of medicals —about $2,500—thereafter. Gallogly settled with Hill in 6/00 for $77,570 in addition to the $10,000 med-pay. He then sued Safeco alleging unfairness in handling of the claim, both because of the delay in settlement and refusal to advance-pay medicals. He also alleged that Safeco owed him additional money under its UIM coverage.

Judge Watters ruled that the insurer can take into account the fiduciary obligation that it owes its insureds when trying to decide whether to make advance payments pursuant to *Ridley* where there is potential conflict. She did not rule on which duty was paramount.

Plaintiff's experts: attorney Patrick Sheehy, Billings (legal); Dennis Gambill, Billings (claims handling, testimony excluded because of insufficient experience).

Defendant's expert: attorney Robert James, Great Falls (legal).

Demand, $460,000; offer, $25,000. Jury request, $158,000; jury suggestion, $0.

Jury deliberated 2 hours including lunch 5th day.

***Gallogly v. Safeco Ins.*, Yellowstone DV 98-937, 4/30/01.**

Thomas Malee, Billings, for Gallogly; Robert Phillips (Phillips & Bohyer), Missoula, for Safeco.

SETTLEMENT: Undisclosed amount, mid-trial, insurance bad faith, UM claim.

Sara Sullivan, then 17, was injured in a collision with an uninsured motorist in 1/98. She suffered anterior subluxation of the right shoulder which caused a tear in the capsule at the shoulder joint in her (dominant) right arm. She developed chondrosis of the shoulder socket, an impingement syndrome, and bursitis. Physical therapy aggravated the injuries. Nick DiGiovine performed an open anterior capsular shift operation in 3/98. The surgery was successful, but she claimed continuing pain and limitations in her shoulder. She concluded PT 3 months after surgery with apparently good results. She claimed that her senior year in high school was essentially ruined by the injury. She incurred $15,000+ medicals and lost $2,800 wages as a video store clerk.

Sullivan had a $25,000 State Farm policy on her own car and $25,000 UM coverage under her mother Carol Vargos's State Farm policy. She also had $25,000 UM coverage under her stepfather Steve Vargos's Allstate policy. She was initially represented by John Johnston (Corette, Pohlman & Kebe), a friend of Steve Vargos. However, he was unable to handle the Allstate claim because his firm represented Allstate. He dealt with State Farm and referred Sullivan to William Joyce for representation against Allstate. Johnston settled with State Farm with local adjuster Robb Slaughter for $50,000 combined policy limits in 6/98. Joyce sent medicals records and bills to Allstate in 11/98 with a demand for $25,000 policy limits. Allstate offered 0, claiming that the $50,000 paid by State Farm fully compensated Sullivan, and requested further information. Sullivan sued. Allstate retained Curt Drake (Keller, Reynolds, Drake, Johnson, & Gillespie) who advised that Allstate's offer would not change unless additional information affected the case's value.

In 5/99 Sullivan suffered an aggravation of her shoulder injury at work and incurred $1,100 additional medicals. In 10/99 she underwent an FCE with Gary Lusin, who opined that her limitations were permanent. DiGiovine opined that her strength and ROM were excellent and that her recovery was 95-97%. Drake felt that the medical evidence did not support a finding of significant impairment or continued problems.

Judge Purcell ordered a settlement conference. Sullivan's counsel expressed concern about whether it would be worthwhile given Allstate's position. Drake stated that he felt that it would be worthwhile. Purcell issued an order that costs of the conference would be borne equally unless either party failed to negotiate in good faith. At settlement conference with James Harrington Allstate did not send the adjuster who had been assigned the claim (Gary Lewis, Pueblo, Colo.), but sent Sherrie Huth, an adjuster from Helena who dealt strictly with unrepresented claimants (all represented adjusters were moved from Montana to Colorado in 2000), although Huth had extensive experience dealing with lawyers during 5 years at the State Fund. During the conference, evaluation consultant Peter Miller in Colorado ran another COLOSSUS evaluation based on an arbitrary 2% impairment rating (he recognized that slight impairment was an issue based on the surgeon's testimony and FCE although no doctor had issued a rating). Allstate offered $3,300, which Sullivan claims was on a take-or-leave basis and which Drake and Huth dispute, and her lawyer William Joyce terminated the conference. Sullivan rejected the offer and went to trial. The Butte jury awarded her $105,000 (MLW 11/27/99:5). Allstate did not appeal and offered to pay its $25,000 UM coverage plus costs. Sullivan moved to hold Allstate in contempt based on its offer at settlement conference. Drake testified that the cost of challenging the motion far exceeded Sullivan's $195 share of Harrington's bill, and Allstate paid the $195. Sullivan then sued Allstate alleging bad faith.

Sullivan alleged that Allstate's Core Claims Process Redesigned which it adopted in 1995 consistently undervalues claims and leads to violations of the MUTPA. She alleged that Allstate's COLOSSUS data base was fundamentally flawed in that it only contains settlements by Allstate since it instituted CCPR, and which reflects Allstate's policy of only paying up to policy limits, does not distinguish represented and unrepresented settlements, and only includes verdicts if Allstate pays the entire verdict and does not include the amount that verdicts against Allstate exceed its limits. (COLOSSUS is a computer program licensed to Allstate by CSL) Allstate denied each of these allegations. Sullivan's expert adjuster John Gillespie evaluated her claim at $75,000-$125,000 prior to the verdict. State Farm adjuster Slaughter evaluated it at $50,000+. Sullivan alleged that Allstate failed to acknowledge and act promptly on her communications (§33-18-201(2)), failed to adopt & implement reasonable standards for prompt claims investigation (§201(3)), failed to properly investigate (§201(4)), failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement when liability had become reasonable clear (§201(6)), compelled her to institute litigation through its DOLF and CCPR policies by offering an inappropriately low amount in settlement (nothing) until the eve of trial (§201(7)), and failed to provide a reasonable explanation for its refusal to pay anything under the UM coverage (§201(14)).

Allstate contended that the value of Sullivan's claim was reasonably debatable, that the medical evidence reflected an excellent recovery, and that a general damage award exceeding $30,000-$35,000 was not expected. It contended that it considered the "well-seasoned experience" of 3 adjusters who felt that the claim did not exceed $50,000 in value and the opinion of Drake that it might be valued at less than $50,000, or more than $50,000 by a Butte jury. It contended that Sullivan did not experience any financial distress since it paid her $5,000 med-pay and State Farm paid her $10,000 med-pay (plus $50,000 UM) before she presented her claim to Allstate for $25,000 UM, and since she also had health insurance sufficient to cover her medicals, so that the total of all insurance recoveries equaled the

$105,000 verdict.

Sullivan sought $69,221 compensatory damages and $15 million punitives. She settled for an undisclosed amount Monday morning on the 6th day of trial as she was on the verge of completing her case-in-chief.

Plaintiff's expert: John Gillespie, Butte (retired Farmers Ins. adjuster)

Defendant's experts: none.

***Sullivan v. Allstate Ins. and (Intervenor) Computer Sciences Corp.*, Silver Bow DV-00-41, dismissed 6/11/01.**

Rick Anderson & Mick McKeon (McKeon & Anderson), Butte, and William Joyce (Joyce & Starin), Butte, for Sullivan; Steve Reida (Landoe, Brown, Planalp, Braaksma & Reida), Bozeman, for Allstate; Scott Corbitt (Williams & Ranney), Missoula, for CSC.

VERDICT: Defense, insurance contract/bad faith.

A 12-0 Bozeman jury found that Margaret Thorsen's liability insurance was properly canceled before a collision between Kenneth Thorsen and Suzanne Beetsch and provided no coverage, no coverage for Thorsen was created by estoppel after the accident, and Farmers Ins. did not breach its contract with Beetsch, violate the UTPA, commit fraud, or act with malice to warrant punitives. Judge Salvagni directed verdict for Farmers on Thorsens' emotional distress claims and Beetsch's claim for breach of contract under the Thorsen policy.

On 10/28/93, Kenneth, permissive user of Margaret's vehicle, slid through a stop sign in Bozeman and was T-boned by Beetsch. (Kenneth and Margaret were living together at the time of the accident and married in 1996.) The Farmers policy for the Thorsen vehicle had been canceled as of 10/9/93 for failure to pay the premium. Thorsens went to Lanphear Agency to report the accident. Stacy Lanphear informed them that the policy was out of force. Thorsens reinstated it at 3:45 p.m., more than 3 hours after the accident. They were told that it would run from then on and would not provide coverage for the accident. They unsuccessfully tried to settle with Beetsch directly for her damages and injuries caused by Kenneth's negligence. Beetsch was told of the lack of liability coverage for Thorsen. She made a claim under her own Farmers UM policy. Farmers mistakenly paid damage to the Beetsch vehicle under the Thorsen policy because the computer showed only that the policy was reinstated the day of the accident and not the actual time of the reinstatement. Because of the mistake, Beetsch did not have to pay a $1,000 deductible from her policy and Thorsen did not have to pay Beetsch's property damage of $1,149. Farmers did not ask Thorsens for repayment of these amounts.

Beetsch's counsel was informed in 4/94 that the claim was a UM claim and that the property damage was paid by mistake. He revoked any authorizations for Farmers to obtain medical information directly from the healthcare providers. In 7/95 he sent a settlement brochure containing the records and an evaluation of Beetsch's claim at $800,000, directed to the out-of-force Thorsen policy. After reaffirming with Beetsch's lawyer that the Thorsen policy was canceled before the accident, Farmers offered Beetsch $20,000 in 10/95, based on medical & employment records, photos of Beetsch's vehicle, and other information in the settlement brochure, and a review of verdicts for similar injuries. This offer was rejected.

Beetsch sued Thorsen in 12/95. Although it was a UM claim, she did not sue Farmers. Beetsch's lawyer called a Farmers employee shortly after the complaint was filed and was told that liability coverage existed for Thorsen at the time of the accident. The employee looked at the computer screen that showed the mistaken property damage payment and assumed that the liability policy was in force. The employee quickly realized his mistake and informed Beetsch's lawyer of the actual status of the policy. During this time a different employee had phoned Thorsen to let him know that he would be served with the complaint, and to let Farmers know when that happened. Thorsen testified that the employee stated that he should bring in the complaint and that Farmers would "take care of it." The filing of the complaint raised the issue of coverage under the Thorsen policy. Farmers sent a formal denial of coverage letter to Thorsens 12/19/95.

Farmers hired Ronald Lodders & Len Smith (Crowley Firm) to represent its interests and attempted to intervene as a matter of right. Both parties objected to intervention and Judge Moran denied it. Thorsen admitted liability and waived his right to a jury. When it became apparent that he had no intention of putting on a defense, Farmers offered to assume his defense. The offer was refused. Farmers finally was allowed to intervene permissively on condition that there would be no jury trial and no issue regarding liability and that it would have to prove that Thorsen was uninsured. Farmers was allowed into the case in late 7/96. Trial was set for 11/96. Farmers then offered Beetsch $50,000 to settle, which was refused. At settlement conference with Clifford Edwards, Farmers increased its offer to $90,000. The offer was refused. At trial of the coverage portion of the claim Farmers notified the parties that it would pay any judgment that Beetsch secured, even if it exceeded her $200,000 UM limits. Beetsch asked for $1.1 million+. Moran determined her damages at just over $140,000 and entered judgment against Thorsen. Farmers immediately paid this amount from Beetsch's UM limits. Thorsen paid nothing on the judgment. Farmers has not yet filed a subrogation action against Thorsen to recover the damages he caused to Beetsch. Beetsch and Thorsens then sued Farmers.

The central issues at the current trial were whether Farmers breached its contracts with Thorsens and Beetsch, whether it was guilty of misrepresentation or actual or constructive fraud, whether it violated the UTPA, and whether its actions warranted punitives. Farmers contended that it had a reasonable basis in law & fact for its decisions, the contract with Thorsen was out-of-force at the time of the accident, and its actions on the file were not based on fraud or malice. Its adjusters, agents, and lawyers testified that although mistakes were made on the file, they had tried to adjust the Beetsch claim promptly & fairly despite obstacles allegedly created by Beetsch and Thorsens, and that they went beyond anything required by contract or law in agreeing to stack Beetsch's $100,000 UM limits, open limits of her policies and pay any judgment she secured, and not filing a subrogation suit to recover the amount Thorsen owed for the damages he caused.

Plaintiffs' expert: insurance agent James Smith, Bozeman.

Defendant's expert: lawyer Steven Harman, Billings.

Demand at settlement conference, $1.5 million by Thorsens, $500,000 by Beetsch; offer, 0. Jury request, discretion; jury suggestion, 0. Thorsens' statement of

claim, $5 million punitives, $20,000 attorney fees from the underlying case, and general damages for emotional distress. Beetsch's statement of claim, $10 million punitives, $70,000 fees & costs from the underlying trial, and $500,000 for emotional distress and pain & suffering.

Jury deliberated 4½ hours 10th day.

***Thorsen and Beetsch v. Farmers Ins. Exchange,* Gallatin DV 97-428, 9/28/01.**

James Kommers (Kommers, Steele & Bentson), Bozeman, for Thorsens; Peter Kirwan (Kirwan & Barrett), Bozeman, for Beetsch; Shelton Williams & Scott Corbitt (Williams & Ranney), Missoula, for Farmers.

DIRECTED VERDICT: Defense, UTPA, auto accident claims handling... Molloy.

Alice Gilbert entered Main St. in Sheridan 10/14/97, but backed up to avoid being hit by a motor home and collided with Tammy Burgett who was behind her. Burgett's property damage settled for $315 in 11/97. She treated with a chiropractor for 5 visits, and then a family practitioner and a PT through 3/98. She retained Christopher Angel, who demanded $3,255 advance med-pay 2/12/98 under the then new *Ridley*. Gilbert's insurer SAFECO requested that Burgett sign an Advance Payment Agreement which limited any claim against Gilbert to her $50,000 policy limits and authorized an IME and release of medical records. Angel refused to have Burgett sign the agreement, but on 2/25 gave SAFECO a limited authorization which allowed it to obtain medical records dated prior to the accident (in relation to any preexisting conditions), but prohibited it from speaking with the doctors or other providers or requesting reports from them. However, according to Burgett, on 3/18 SAFECO requested narrative reports from all 3 providers and spoke with the chiropractor on the phone, in violation of the authorization. On 3/14/98 SAFECO advanced $2,579 (3 months meds). Settlement was reached in 10/98 for $12,000 including the advance. Burgett then sued SAFECO alleging UTPA violations, fraud, and oppression, and sought class certification. She alleged that there was clear liability for advance-pay of the entirety of her medicals based on reports of the chiropractor, her doctor, and an IME, and that the delay and non-payment caused her depression and were used to leverage settlement. SAFECO asserted that there were reasonable questions of causation, including photos of the low-speed impact vehicle damage, her statement that she had recently treated with the chiropractor, a report from an accident reconstructionist, a nurse review of the claimed conditions, and a call from the chiropractor questioning whether her complaints were related to the accident. Several months later the chiropractor wrote a report at Burgett's request, stating that the cause of all her injuries was the accident. Burgett claimed that SAFECO initially represented that it had a doctor review her medical records on 2/25, but the next month corrected it to say that it was a nurse. Burgett claimed actual and punitive damages. In 5/01 Judge Molloy denied class certification, and denied summary judgment.

Following Plaintiff's case on the 2nd day of trial Molloy granted SAFECO's motion for directed verdict, concluding that there was reasonable dispute over causation of Burgett's medical condition and claimed wage loss, and no "clear & convincing" evidence for punitives.

Plaintiff's experts: none.

Defendant's experts: attorney Robert Phillips, Missoula; attorney Allan Windt, Philadelphia.

Demand at settlement conference 2 weeks before trial with Magistrate Erickson, $495,000, reduced to $300,000; offer of judgment prior to settlement conference, $10,000.

***Burgett v. SAFECO National Ins.*, CV 99-13-BU, 3/13/02.**

Alan Blakley (Blakley & Velk), Missoula, and Geoffrey Angel (Angel Law Firm), Bozeman, for Burgett; Carey Matovich & Geoffrey Keller (Matovich & Keller), Billings, for SAFECO.

VERDICT: $8,300 compensatory, 0 punitives, insurance bad faith for failure to advance-pay medicals, summary judgment on liability.

A Missoula jury awarded Oren Etter $8,300 compensatory damages and found no malice (and thus no punitives) following Judge Molloy's summary judgment ruling that SAFECO Ins. acted in bad faith by not advancing medicals (MLW 4/6/02:5).

SAFECO's insured Helen Gulley crossed the centerline of Hwy 93 near Lolo in 12/96 and struck a vehicle driven by Etter. Gulley was killed and Etter received a serious leg injury. Etter made a claim for PI and property damage. SAFECO offered to settle the property claim for the value of the property and the injury claim for the bodily injury liability limits of $100,000. Etter agreed to settle the property damage claim and SAFECO paid it. He failed to respond to the limits offer for more than a year, during which SAFECO continued to offer the policy limits. In 1998, following *Ridley* (Mont. 1997), Etter demanded $850,000, or that policy limits be paid without a release or that his medicals be paid without a release. SAFECO advised Gulley's estate of these demands and retained John Bohyer to represent the Estate. The Estate demanded that SAFECO not pay or deplete the limits without a release. SAFECO declined to advance pay medicals since it was already offering the full policy limits in settlement. Etter fired his first lawyer and hired current counsel in the fall of 1998. His counsel argued that *Ridley* required payment of medicals. SAFECO relied on *Juedeman* (Mont. 1992), obligating an insurer to obtain a release for its insured. Etter sued the Gulley Estate in 1999, but missed the 1-year statute for claims against an estate. Judge Henson therefore ruled that he could not recover any personal assets from the Estate, and that his recovery was limited to the available insurance. He then accepted SAFECO's policy limits offer and released SAFECO's insured in exchange for the $100,000 limits.

Etter then filed this bad-faith suit against SAFECO. Judge Molloy granted summary judgment for Etter and the case proceeded to trial on damages. Molloy instructed that SAFECO was liable and that the jury was to determine damages and consider malice.

Plaintiff's experts: orthopedic surgeon Donald Harrell, Missoula; PT Jill Olson, Missoula; consumer loan officer Bill St. John, Missoula; attorney Gary Zadick, Great Falls (deposed, summary judgment).

Defendant's expert: attorney Charles Cashmore, Billings.

Prior to Molloy's summary judgment Etter proposed a high-low agreement of $150,000-$500,000, which SAFECO rejected. Following Molloy's summary judgment and evidentiary issues the Friday before trial Etter demanded $75,000 and SAFECO offered $15,000. Jury request, $108,300 ($8,300 in interest related to the delay in paying medicals, $50,000 for alleged additional injury due to lack of PT caused by non-payment, and $50,000 for emotional distress) plus punitives; jury suggestion, 0 or at most $8,300.

Jury deliberated 3½ hours 3rd day.

***Etter v. Safeco Ins. of Illinois*, CV-00-149-M, 3/27/02.**

Kevin Jones & Liana Messer (Christian, Samson & Jones), Missoula, for Etter; Mark Williams (Williams & Ranney), Missoula, for Safeco.

VERDICT: Defense, insurance contract/bad faith, credit life rescission based on misrepresentation.

An 8-4 Billings jury found that Union Fidelity Life Ins. did not breach its contract with Clarence & Barbara Williams.

Williamses purchased a new pickup from a Billings auto dealer in 12/96 and obtained financing from the dealership and purchased credit life insurance. To qualify for the insurance they had to certify that they were "in good health and not under treatment for, or receiving medical advice for any illness, disease...." Clarence had been diagnosed with metastatic renal cell carcinoma in 3/96, and received radiation treatments in April and May, but had not received specific cancer treatments for several months prior to the auto purchase. He died in 9/97 from cancer. After receiving the claim Union Fidelity obtained medical records, discovered the cancer, and rescinded the policy pursuant to §33-15-403 based on its claim that Williams had materially misrepresented his condition on the application.

Barbara sued Union Fidelity alleging breach of contract, violation of the UTPA, "bad faith," and fraud and seeking punitives. She argued that Clarence had understood the radiation treatments to have shrunk the tumor, he was optimistic about his chances, he felt that he was going to "beat" the cancer, and he believed that he was "in good health" when he signed the insurance certificate. She also alleged that Union fidelity was guilty of "post-claim underwriting" in that it did not ask specific medical questions in its application or review Clarence's medical records until after the claim. Her experts testified that the policy was overpriced, the form was misleading and ambiguous, Union Fidelity should have used specific questions related to diagnosis or treatment for cancer since such information was material to the risk to be assumed and it used fact-specific forms in other states. Her experts also noted that the form asked for the applicant's present "opinion" of his health and therefore Union Fidelity should not be allowed to challenge the policy based on past medical history.

Union Fidelity's expert testified that all aspects of the product were regulated, the form had been approved by the Montana Insurance Commissioner, and the short, single, or multi-question forms used to qualify applicants for insurance at point-of-sale were standard in the industry. Union Fidelity's form stated that Clarence's signature certified matters "to the best of his knowledge and belief." Judge Fagg instructed that the test for material misrepresentation was whether a reasonably prudent person would have understood when he signed the application that he was not in "good health." He also instructed that where an applicant certifies that he is in good health and had reason to believe and did believe that he was in good health, recovery may be had although it subsequently develops that this was not the case.

Plaintiff's experts: Robert Hunter, DC (insurance practices); Marshall Reavis, Chicago (insurance practices).

Defendant's expert: attorney Hugh Alexander, Denver.

Demand, unless settlement negotiations were in "7 figures," Plaintiff was not interested; offer, $75,000 prior to trial, $100,000 first day of trial. Jury request, $36,000 due under the contract plus punitives; jury suggestion, 0 due under the contract, but if the jury finds that Union Fidelity breached the contract, $36,000 is the correct figure.

Jury deliberated 3 hours 4th day; Judge Fagg.

***Williams v. Union Fidelity Life Ins.*, Yellowstone DV 99-501, 5/23/02.**

Randall Bishop (Jarussi & Bishop), Billings, for Williams; Andy Forsythe & Nancy Bennett (Moulton, Bellingham, Longo & Mather), Billings, for Union Fidelity.

VERDICT: $60,746 ($35,000 punitives), work comp bad faith.

A Helena jury found for Norma Thiel on her work comp bad faith claims against Brentwood Services and St. Peter's Hospital and awarded $25,746 actual damages, $10,000 punitives against Brentwood, and $25,000 punitives against St. Peter's. Votes were 11-1 on bad faith by Brentwood, 12-0 on bad faith by St. Peter's, 10-2 on the amount of damages, 10-2 for assessing punitives against Brentwood, 12-0 for assessing punitives against St. Peter's, 9-3 on the amount of punitives against Brentwood, and 10-2 on the amount of punitives against St. Peter's.

Thiel, 71, works in St. Peter's cafeteria. She was injured in 5/98 while lifting plate warmers. Days before she had been demoted, according to her, for embarrassing her supervisor in front of other hospital management, according to St. Peter's, for poor work activity. She did not tell her supervisor of her injury, but numerous employees in the days following the accident acquired actual notice of it. 31 days after the incident she encountered health nurse Jan Edgar in a hall and told her of the injury. Edgar referred the claim to Brentwood adjuster Cheryl Lee, who, Thiel contended, conducted no investigation but denied liability on the basis of the day-late notice. Thiel's injury forced her off work in 11/98 but she claimed that she was forced to return in 2/99, having exhausted all of her leave. In 11/00, 17 months after her injury, St. Peter's and Brentwood accepted liability, having concluded that the Comp Court might conclude that certain employees might be considered supervisors and had actual knowledge of the accident within 30 days. Thiel alleged that had Lee investigated she would have ascertained early that St. Peter's had actual notice of the injury, and thus sufficient notice under the statute. Instead, Thiel claimed that she was forced to work when she should have been on comp, then to return to work when she could no longer afford to be off. She contended that instead of investigating, St. Peter's and its TPA embarked on a campaign to discredit her and show that she had concocted the incident in retaliation for her demotion.

Plaintiff's experts: orthopedic radiologist Dennis Alzheimer, Helena; orthopedic surgeon David Heetderks, Helena.

Defendants' experts: attorneys Andrew Adamek, Oliver Goe, and Geoffrey Keller, Helena (work comp claims handling).

Demand, $95,000; offer, $20,000. Jury request, $33,000 plus punitives; jury suggestion, no liability. Mediator, Tom Keegan.

Jury deliberated 3 hours on actual damages, ½ hour on punitives 4th day; Judge McCarter.

***Thiel v. St. Peter's Hospital and Brentwood Services Administrators*, Lewis & Clark ADV 01-52, 5/23/02.**

Joe Seifert (Keller, Reynolds, Drake, Johnson & Gillespie), Helena, for Thiel; Brent Cromley (Moulton, Bellingham, Longo & Mather), Billings, for St. Peter's; Norman Grosfield (Utick & Grosfield), Helena, for Brentwood.

VERDICT: Defense, insurance bad faith, arson.

A Helena jury rejected Norm & Darlene Scott's bad faith claims against Mountain West Farm Bureau Mutual Ins., finding that a fire on their property had been intentionally set by them.

On 8/18/96 the Lakeside Volunteer FD responded to a fire at Scotts' home on Canyon Ferry Drive near Helena. The 1930s home on 20 acres was only partially burned but declared a total loss. Adjuster Rick Gaines examined the home and found the fire pattern suspicious. Randolph Harris concluded that it was incendiary, but Scotts accused him of planting evidence. A private investigator found evidence of financial distress and statements of Scotts that they had been joking that they should burn the place. The State Fire Marshall left the cause undetermined, but had postulated an accidental theory. Scott claimed that he had replaced parts on the oil furnace in the days before the fire. 15 days after the fire Scotts had the home demolished and claimed that the insurer had given permission. Mountain West (represented by a different law firm in the underlying claim) paid $75,000 dwelling and $52,500 contents policy limits. Scotts sued in 1999 alleging bad faith. Mountain West defended on grounds that Scotts had committed arson and had committed fraud in the contents claim and in destruction of the property. The State Fire Marshall submitted an expert disclosure in 7/00 stating that the cause of the fire was incendiary. Chris Rallis's report stated that the cause was arson by Scotts. In 8/03 an estranged family member of Scotts came forward to disclose that she knew that they had been near the fire scene minutes before and heard admissions about the fire. Mountain West's $10,000 settlement offer was then withdrawn.

Plaintiffs' experts: none.

Defendant's experts: Retired State Fire Marshall Richard Levandowski; Randolph Harris, Denver (fire cause/origin); Chris Rallis, Sioux Falls (fire cause/origin).

Jury request, $192,000; jury suggestion, 0.

Jury deliberated 5½ hours 4th day; Judge Erickson.

***Scott v. Mountain West Farm Bureau Mutual Ins.*, CV 99-19-H, 11/20/03.**

John Doubek (Doubek & Pyfer), Helena, for Scotts; Randall Nelson (Nelson & Dahle), Billings, for Mountain West.

VERDICT: Defense, insurance bad faith claims following $375,000 stillbirth malpractice settlement.

A Missoula jury found that The Doctors' Company did not misrepresent pertinent facts relating to coverages as to medical malpractice claims by Bobbie & Ron Peterson, refuse to pay their claims without a reasonable investigation based on all available information, or neglect to attempt in good faith to make prompt, fair, and equitable settlements if liability had become reasonably clear. According to Defendant, 9 jurors voted in favor of The Doctors' Company and 3 were undecided but leaned in favor of The Doctors' Company.

Bobbie, then 45, saw OB-GYN Robert St. John 11/11/96 when she was 5 weeks pregnant with twins. She was taking Prozac. She did not tell St. John that she was also taking Xanax, a schedule D drug, contraindicated in pregnancy, Mepergan Fortis, a schedule C drug which can addict the fetus, or Ercaf, which can cause premature delivery. One twin had a potentially lethal cyst in its chest which required delivery and immediate surgery in a tertiary center. St. John arranged to see her on a 2-week interval starting 3/24/97. On 5/27 she presented with what he believed to be advanced pre-eclampsia. She was very sick. The baby with the cyst was alive. The baby without the cyst may or may not have been alive. St. John arranged for transport to the U. of Utah where both babies were found to be dead. 6 days later Bobbie was diagnosed with peripartum cardiomyopathy which was successfully treated. The autopsy indicated to the pathologist that the twins were monochorionic-monoamniotic (resided in a single sac), contrary to determinations early in the pregnancy by St. John and Dr. Devore at the U. of Utah, a perinatologist specializing in ultrasonography, who was able to see that the babies were in 2 sacs and thus monochorionic-diamniotic. Petersons sued St. John and OB-GYN Andrew Jamieson, alleging malpractice. St. John and Jamieson maintained that their care was proper. 2 in-house consultants for The Doctors' Company agreed with them. Cardiomyopathy has an occurrence rate of 1 in 15,000 and is often fatal. Monochorionic and monoamniotic pregnancies occur 1 in 6,000 and are fatal 50% of the time.

The Doctors' Company hired John Maynard to represent both doctors. He determined that the case was defensible, denied negligence and causation, and alleged comparative negligence by Bobbie. Plaintiffs demanded $350,000. The Doctors' Company offered $25,000. Plaintiffs refused to negotiate and sued in 1/00. The Doctors' Company requested Petersons to produce medical bills and medical & psychological records and identify experts. Petersons responded that all relevant medical & psychological records had been produced at the Medical-Legal Panel, and produced no medical bills or information relating to experts. In 12/00 Petersons demanded $400,000 and The Doctors' Company offered $80,000. Plaintiffs walked out of the mediation before The Doctors' Company representative could offer his full authority of $100,000. A month later Plaintiffs contacted liability expert OB-GYN Michael Ross, Torrance, Calif. In 4/00 they contacted liability expert OB-GYN Van Kirke Nelson, Kalispell. Nelson's preliminary review raised questions about whether St. John met the standard of care. In 5/00 The Doctors' Company's adjuster asked Craig Daue to reopen negotiations. Daue declined. The Doctors' Company was not allowed to prove that Daue offered the representative a job with his firm during that call.

In 9/01 there were new developments in Bobbi's psychological condition and unrelated criminal charges against Jamieson. It was then determined that a potential conflict existed between Jamieson and St. John, requiring separate counsel. Gary Kalkstein was brought in to represent Jamieson. Nelson was disclosed as a standard of care expert for both doctors. Ross was disclosed as a standard of care expert for Bobbie. Numerous treating doctors were deposed. In the summer of 2001 Petersons finally produced records of Bobbi's counselor Judy Anderson-Smith, which recorded visits back to 12/99 and contained information important to The Doctors' Company's evaluation of the case, which had been requested 20 months earlier. Based on the new developments and advice from defense attorneys, The Doctors' Company increased its evaluation to $400,000. Petersons increased their demand to $850,000. On 1/17/02 at mediation before Ronald Lodders the case settled for $375,000. 4 months later Petersons filed this suit against The Doctors' Company alleging violation of §§ 33-18-201(1), (4), and (6), bad faith, malice, and fraud.

At trial Petersons contended that The Doctors' Company should have settled for $350,000 in the fall of 1999 and not forced them to sue. The Doctors' Company denied that liability was reasonably clear, and alleged that it had a reasonable basis for contesting Petersons' claim and the amount of the claim. Petersons' claims were supported by evidence from The Doctors' Company's file indicating that the adjusters felt that there was an 80% chance of liability against the doctors. That evidence was contradicted by testimony of Maynard and Kalkstein that liability was never reasonably clear and that The Doctors' Company's offers were in accord with their valuations of the fair value of the case. The Doctors' Company adjusters testified that in their experience, stillbirth cases settled for $25,000-$100,000. The Doctors' Company's attorneys' evaluations were supported by their knowledge of stillbirth and minor death verdicts & settlements and *Montana Law Week* reports of minor death verdicts and offers. The Doctors' Company proved that during the relevant time, *Montana Law Week* had reports of 18 verdicts dealing with death cases involving minors, of which 11 resulted in defense verdicts and 6 resulted in verdicts from $16,000-$170,000. In 4 of the reported cases there were no offers, 5 of the offers were $25,000 or less, and 7 offers were in excess of $25,000.

St. John testified that his care was appropriate and any other choices he could have made would not have saved the babies and would have jeopardized

his patient's life. Nelson testified that both doctors complied with the standard of care.

Judge McLean denied The Doctors' Company's motion to compel Petersons' lawyers to produce their file in the underlying malpractice case.

Plaintiffs' experts: attorney Dexter Delaney, Missoula (liability); counselor Judy Anderson-Smith, Butte; psychiatrist Terry Lanes, Ft. Benton; psychiatrist Richard Felix, Missoula.

Defendant's experts: attorney Robert Phillips, Missoula (liability); psychiatrist Larry Martin, Missoula.

Demand, $6.3 million; offer, $30,000. Jury request, $6 million; jury suggestion, $25,000. Mediator, Randy Cox.

Jury deliberated 4 hours 9th day.

***Peterson v. The Doctors' Company*, Missoula DV-02-491, 6/17/04.**

Steven Harman, Billings, and Craig Daue, Missoula (Buxbaum, Dix, Daue & Harman), for Petersons; Shelton Williams & Susan Moriarity Miltko (Williams Law Firm), Missoula, for The Doctors' Company.

VERDICT: $280,000, insurance bad faith.

A Billings jury found that Metropolitan Property & Casualty violated the UTPA and breached the implied covenant of good faith & fair dealing in connection with an underlying claim by Mike Balich, and awarded $30,000 compensatory damages and $250,000 punitives.

Balich was injured in a collision with Charlie Layboult, who pled guilty to DUI the day after the accident. Balich claimed ankle and chest injuries, a fractured rib, nerve entrapment, and aggravation of allergies and asthma. Layboult's insurer MetLife disputed all claims beyond the ankle on the basis that they were not reported in the medical records until later, and that the chest, allergies, and asthma had other causes unrelated to the accident. Late in the case it increased its offer from $4,000 to policy limits of $50,000. James Edmiston represented Balich in the underlying claim. Peter Habein and Ian McIntosh represented Layboult.

Balich alleged that MetLife acted improperly in adjusting and handling his claim. He alleged that it violated MCA 33-18-201(1) by misrepresenting pertinent facts in its policy relating to coverages, §201(4) by refusing to properly evaluate and pay the claim without a reasonable investigation based on all available information, §201(5) by failing to affirm or deny coverage within a reasonable time, and §201(6) by neglecting to attempt in good faith to effectuate prompt, fair, and equitable settlement of claims in which liability had become reasonably clear. He alleged that pursuant to MCA 242(4) he has a separate cause for violation of those sections, that MetLife's conduct is of such frequency as to indicate a general business practice, and that it breached the covenant of good faith & fair dealing it owed him as a third-party claimant which constitutes common law bad faith.

MetLife contended that it did not violate the UTPA or common law duties and possessed a reasonable basis in law and fact for its adjusting and handling of Balich's claim against Layboult. It contended that the communications, impressions, opinions, and advice from Habein and McIntosh with respect to the claim and suit constituted evidence supporting the reasonable basis in law and fact for its actions. It asserted that Balich's claim lacked evidence of fraud or malice. The jury was instructed as to whether there was an agency relationship between Habein/McIntosh and MetLife.

Plaintiff's experts: attorney James Manley, Polson; attorney James Edmiston, Billings.

Defendant's experts: attorney Michael Anderson, Billings; Lannie Stevens, Laramie (insurance practices); Tom Sexton, Seattle (MetLife claim rep, video).

Demand, $80,000; offer in 2001, $20,000-$25,000, offer at mediation in 2004, $5,000. Jury request, $30,000; jury suggestion, $0. Mediator, Magistrate Anderson (the case was assigned to Judge Cebull at that time, later assigned to Anderson).

Jury deliberated 3 hours including lunch 5th day on liability/compensatory damages, 1 hour on punitives; Magistrate Anderson.

***Balich v. Metropolitan Property & Casualty Ins.*, CV 01-85-BLG, 6/18/04.**

David Paoli (Paoli & Shea), Missoula, and Shane Colton (Edmiston, Schermerhorn & Colton), Billings, for Balich; Randall Nelson (Nelson & Dahle), Billings, for MetLife.

SETTLEMENT: $5,022,000, ERISA, insurance coverage/bad faith, WARN Act, bankruptcy, attorney fee claims, real property dispute, all other litigation relating to Darby Lumber ESOP and closure of mill... $1,923,000 to ESOP, $600,000 to bankruptcy estate, $2,498,000 attorney fees/costs.

In 8/94 Robert & Peggy Russell formed an ESOP for employees of Darby Lumber Inc., of which they were 100% owners. The ESOP purchased 56% of the company stock from Russells for $6.5 million. Russells served as selling shareholders, officers, and directors of the Company and fiduciaries of the trust at the time of the trust's purchase of their shares. Russell personally guaranteed a loan from US Bank, which the ESOP used for the purchase. DLI closed in 1998 due to a drop in the finished lumber market. In 1999 several of DLI's 100+ employees sued Russells alleging ERISA violations, mainly that they failed to act as prudent fiduciaries in establishing the stock price, resulting in its overvaluation.

Plaintiffs asserted claims on behalf of the entire ESOP and its associated trust pursuant to ERISA. They alleged that Russells failed to obtain and review an independent appraisal in advance of the Trust's purchase of DLI as required by law. They alleged that the untimely appraisal contained numerous errors, including double counting of company timber and failing to recognize environmental liabilities. They claimed $28 million+ damages. In discovery responses in 1/04 Plaintiffs claimed approximately $8.4 million attorneys fees & costs on the amounts allegedly owed. Throughout 5 years of litigation Russells asserted that they had committed no wrong and they made no settlement offers. They claimed that they were personally bankrupt and could not fund any settlement or judgment.

Russells tendered defense to Indiana Lumbermens Mutual Ins., which refused to provide coverage or defense. Russells filed a coverage action against ILM and Judge Molloy ruled that it owed them a defense. ILM appealed. Russells sued ILM for bad faith.

In 3/02, a month before trial in the ERISA case, DLI filed Ch. 7. The bankruptcy trustee and ERISA Plaintiffs filed additional claims allegedly on behalf of DLI and the ESOP, directed at DLI's financial and legal advisors, who were all testimonial witnesses and/or defense counsel in the ERISA case, including John Menke (an ERISA lawyer who had advised DLI in establishing the ESOP), Moss Adams (DLI's accounting firm), Independent Appraisal, JC Buck Corp. (financial advisor to DLI), and Reep, Spoon & Gordon (Russell's defense counsel and corporate counsel).

The bankruptcy trustee also asserted a claim directly against Russells and the law firms which represented them, seeking recoupment of several million dollars (exact amount not specified by the trustee) of fees paid to fund their defense by ILM. These fees had been paid by ILM to Russells and their counsel after Molloy's declaratory judgment establishing ILM's duty to defend. The trustee claimed that these funds were assets of the bankruptcy estate.

ILM also asserted a $1 million+ claim for reimbursement against Russells. It claimed that it would prevail in reversing Molloy's coverage decision on appeal. It asserted that it would pursue Russells to repay all funds paid in their defense if it did prevail.

Russell's contended that the stock had been valued correctly and that their valuation was confirmed by the independent appraiser prior to the ESOP transaction. The advisors contended that the claims against them were barred by the statute of limitations and that they had committed no wrongs.

After 3 settlement conferences before Judges Cebull, Erickson, and Ostby, a global resolution of all cases was reached for a total of $5,022,000 including $1,923,000 to the ESOP, $600,000 to the bankruptcy estate from Indiana Lumbermens, and $2,498,000 attorney fees/costs. Russells contributed $19,000 to the settlement, receiving releases from all parties, including a release of claims for reimbursement of fees asserted by ILM and the bankruptcy trustee. ILM contributed $4,153,000, conditioned on release of the coverage and bad faith claims against it. The remainder of the settlement funds was collectively contributed by the group of other defendants including the appraisal firm, accountants, and legal counsel. The bankruptcy estate also settled separately for $35,000 from land swap litigation.

On 7/27/04 Judge Kirscher approved a $25 million proof of claim against the bankruptcy estate on behalf of ESOP Plaintiffs. However, the estate has only $635,000, which must be paid pro rata to all claimants after administrative expenses.

Plaintiffs' motion for reconsideration of Judge Molloy's order denying enforcement of an earlier settlement with Russells that was reached before Cebull for $4.5 million (MLW 12/6/03:7) was pending at the time the global settlement was achieved.

***Behling et al v. Russell et al,* CV-99-165-M; *Torgenrud et al v. Moss Adams LLP et al,* CV-04-06-M; *Behling et al v. Reep et al,* CV-02-15-M; settlement approved by Judge Molloy 7/7/04 and by Judge Kirscher 7/27/04.**

Patrick HagEstad & Lon Dale (Milodragovich, Dale, Steinbrenner & Binney), Missoula, Monte Beck & John Amsden (Beck, Richardson & Amsden), Bozeman, and Philip Carstens & Michael Black (Lukins & Annis), Spokane, for Plan Plaintiffs; Ch. 7 Trustee Donald Torgenrud (Torgenrud Law Office), St. Ignatius, for Darby Lumber Estate; Jean Faure, Kenneth Dyrud, and Michelle Mudd (Church, Harris, Johnson & Williams), Great Falls, Douglas Wold & Leslie Budewitz (Wold Law Firm), Polson, Robert Bell & Richard Reep (Reep & Bell), Missoula, and James Cossitt (Cossitt Law Firm), Kalispell, for Russells; Douglas Wold & Leslie Budewitz (Wold Law Firm), Polson, for Buck; William Mattix (Crowley, Haughey, Hanson, Toole & Dietrich), Billings, for Menke & Associates; Jon Beal (Beal Law Firm), Missoula, for Independent Appraisals; Keith Strong (Dorsey & Whitney), Great Falls, for Moss Adams; James Goetz & Devlen Geddes (Goetz, Gallik, Baldwin & Dolan), Bozeman, for Richard Reep; Guy Rogers (Brown Law Firm), Billings, Mark Williams (Williams Law Firm), Missoula, and Andy Hull, Indianapolis, for Lumbermens Mutual.

ASSERTION WITHDRAWAL: In the settlement report *Behling et al v. Russell et al* (MLW 7/31/04:4), Russells dispute Plaintiffs' assertion that "[Russells] claimed that they were personally bankrupt and could not fund any settlement or judgment." Plaintiffs withdraw this statement as part of the reported background on this settled case.

VOLUNTARY DISMISSAL: Bad faith claim against insurer whose doctor initially refused to consent to settlement of breast cancer malpractice claim.

Marcella Czak sued radiologists Anders Engdahl and Stephen Viltrakis 3/19/01 alleging failure to diagnose her breast cancer when they read her mammograms. The Doctors' Company hired Gary Kalkstein to represent Viltrakis. He denied all malpractice allegations and alleged that Viltrakis did recommend a biopsy, which revealed the malignancy. Under his policy, The Doctors' Company was prohibited from settling without his consent. Viltrakis repeatedly refused to consent to settle, even refusing to attend the first settlement conference, until ultimately agreeing to attend a mediation 10/1/02. On that date he signed a consent to settlement and the case immediately was settled by The Doctors' Company. Engdahl previously consented to settlement and his insurer settled earlier.

Czak then sued The Doctors' Company alleging violation of the UTPA and bad faith in connection with Viltrakis's defense. She alleged that it violated the UTPA because Viltrakis refused to attend a settlement conference in the underlying action and engaged in an expensive course of discovery for 15 months of interrogatories and depositions before he settled on the courthouse steps. She alleged that the stress of litigation compromised her health as a result of The Doctors' Company's refusal to settle when liability was absolutely clear.

The Doctors' Company offered to dismiss any Rule 11 claims it might have in exchange for a voluntary dismissal of the bad faith suit. It contended that it was entitled to summary judgment because it was bound by Viltrakis's refusal to consent to settlement, citing a ruling by Judge Purcell in *Anderson v. The Doctors' Company* (Silver Bow 1997). It also contended that it was entitled to summary judgment because the decisions regarding denial of negligence in the underlying case were made by Kalkstein, and that under *In re Rules of Professional Conduct* (Mont. 2000) it had no right to interfere with Kalkstein's defense. It contended that Kalkstein conducted a thorough investigation and determined that Viltrakis had valid defenses and that liability was not reasonably clear. It also cited Judge Molloy's decision in *Madden v. ALPS* (29 MFR 33), and the 9th Circuit's affirmation which stated: "Madden has cited no law and we know of none that requires an insurer to second-guess the informed opinion of counsel that its insured has defenses to a claim." *Madden* (9th Cir. 2003).

Czak voluntarily agreed to dismiss her claim. No settlement amount was paid.

According to Frank Morrison, "Marcella Czak had a good bad faith case against The Doctors' Company arising out of significant and substantial unwarranted delays surrounding the settlement of her malpractice case," but she "is recovering from breast cancer and could not endure the stress involved in protracted litigation. We felt that The Doctors' Company would recognize its obligation and settle this bad faith case without litigation. They refused to do so, offering $0. We were faced with subjecting our client to additional health risks arising from stressful litigation or dismissing the case in view of the failure of this insurance company to live up to its obligations. We chose to protect our client rather than continue." Morrison noted that as a Supreme Court justice in the 80s, "it was my privilege to author some of the significant bad faith law," and that he has had "extensive experience litigating bad faith cases," and asserted that "this was a good case that was dismissed because we thought it was in the best interests of our client."

Demand, $50,000; offer, 0.

***Czak v. The Doctors' Company*, Flathead DV-03-311, dismissed 5/4/04.**

Frank Morrison & Sean Frampton (Morrison & Frampton), Whitefish, for Czak; Shelton Williams & Meghan Morris (Williams Law Firm), Missoula, for The Doctors' Company.

SETTLEMENT: $650,000, defective house construction, insurance bad faith.

Barry & Kelly Simmons hired Derek Brown Const. to build their home in the Helena Valley in the Spring of 1998. They had lived on the property in a mobile home with their 5 children, and planned, designed, and saved for a custom home with special features including extensive ceramic tile, radiant heat, heart pine plank flooring, tinted plaster walls, and synthetic stone & stucco exterior. The house was completed in 12/98 at a cost of $378,000. As soon as they moved in they noticed that the in-floor radiant heating system was not keeping the house warm and their heat bills were extremely high during cold weather (By the winter of 2003 they had monthly energy bills for their 3,000 square foot house exceeding $700). An upstairs shower leaked, causing stains on the living room plaster and rendering the shower unusable. Bedroom wall finishes flaked and scratched off. Cedar roof shakes were being blown off. The western main floor windows all leaked when it rained. The exterior stone (an artificial product made by Owens Corning) cracked & crumbled and the stucco bulged & cracked. The heart pine flooring cupped and gapped, exposing the concrete subfloor. Simmonses were unable to obtain repair work from Brown, and sued in 7/01. Brown's insurer EMC and its experts concluded that the ridge vent was wrong for the shake roof, the shower leaked, and there were defects in design & installation of the heating system. Simmonses claimed that they established that the flooring material had not been acclimated before installation, and their expert determined that the synthetic stucco had been improperly installed.

According to Brown, 3 experts found heat bills below average or average. It was tile work in the upstairs bathroom which Simmonses had separately contracted for that caused the shower leak. Mrs. Simmons applied inferior paint in the bedroom and caused the finish to flake. Brown warned against installing wide plank over the radiant heating system and Mrs. Simmons refused to allow the installation recommended by Brown and manufacturer Carlisle, particularly pegging or oil-based finish, there was no evidence that it was improperly acclimated, and the installer would have testified that the moisture readings he took were acceptable for installation. There was evidence that Simmonses flooded the shower onto the wood floor, causing it to cup. A leak above the kitchen window was believed to have resulted from a crack in the exterior stone, not from Brown's work, and there were no widespread window leaks. A few cedar shakes blew off, but Mrs. Simmons had insisted on shakes despite Brown's warnings that a shake roof in a high wind area was inadvisable. Simmonses' expert Don Eblen refused to testify that Brown did any improper construction work and Brown's motion for summary judgment was pending at settlement. Brown contends that Simmonses made every construction decision and were warned of potential adverse outcomes of their decisions.

According to Simmonses, even if gas useage was "normal," the system did not heat the house. In 1/04 they could not coax the interior temperature above 60°. They dispute that they contracted separately for the bathroom tile; Brown located the installer and they merely paid him directly. Simmonses contend that Kelly only helped the painting contractors selected by Brown and the contractors selected the materials. Experts hired by Brown's insurer initially thought the finishes failed because they froze during construction. Simmonses dispute that Brown warned them about the flooring and contend that instructions in Brown's project file directing that the product be "stickered" and dried were not followed, and that they do not know of any evidence that the floor was flooded. They contend that their expert testified that the entire exterior stucco system was a defective "barrier," as corroborated by numerous class actions and the fact that such systems are no longer installed. They contend that Eblen would not render opinions unflattering of Brown's work because Brown is active in the homebuilder's association, as is Eblen's employer Bill Pierce, and it was not necessary for Eblen to render adverse opinions in any event since their best evidence was from Brown's own experts. As to the suggestion that the defects were their fault, they note that Brown's insurer paid $625,000 to resolve the case, $375,000 of which was ostensibly to compensate for defects in a house that cost $378,000 to build.

Owens Corning was brought into the case by Brown. It told Simmonses that it would replace the stone at no charge and contribute $23,000+ toward restoration.

Third-party Defendants Pauly Plumbing and Smitty's Fireplace were dismissed after settlement conference. Smitty's was dismissed without payment. Pauly provided a new soapstone sink to replace the original that appeared to have cracked during installation.

In 10/03 Simmonses demanded $700,000 from Brown. Brown made an offer of judgment of $30,000. Trial was set for 10/25/04. In 7/04 Simmonses filed a common law bad faith suit against EMC (not served prior to settlement). In mediation with Stuart Kellner on 10/18 and 10/20, the parties settled with EMC for $375,000 on the defective construction claim and $250,000 on the bad faith claim and $25,000 and replacement stone from Owens Corning. EMC was not represented by counsel at mediation, but was represented by an adjuster.

Plaintiffs' experts: Ken Robbins, Helena (synthetic stucco); Steve Pallister, Helena (plumbing); Fred Seton (Radiant Direct), Libby; Don Eblen, Helena (house construction).

Defendants' experts: Douglas Miller (Entranco Engineering), Helena; David Zachmann, Helena (house construction), Helena; Kevin Pope (MKK Engineering), Billings.

***Simmons v. Derek Brown Const., Cultured Stone Div. of Owens Corning, Smitty's Fireplace, and Pauley Plumbing,* Lewis & Clark CDV-01-445, 10/20/04.**

Joe Seifert (Keller, Reynolds, Drake, Johnson & Gillespie), Helena, for Simmonses; James Cumming, Helena, for Brown; William Bronson (of counsel, Smith, Oblander & Mora), Great Falls, for Owens Corning and Smitty's Fireplace; Gregory Murphy (Moulton, Bellingham, Longo & Mather), Billings, for Pauly Plumbing.

VERDICT: Defense, insurance bad faith claim following settlement of auto collision claim.

A Billings jury found that State Farm did not commit bad faith in the handling of an auto collision claim by Ruth Wade against its insured Tim Avallone.

On 9/1/99 around 6 p.m. Wade was traveling north on Hwy 212 from Red Lodge in a Toyota Camry. As she was turning left toward Brad's Small Engine Repair she was struck on the left front fender by Avallone who was attempting to pass a vehicle behind her. Wade and Avallone stated at the time that he was passing a pickup & horse trailer; after the case settled it was disputed whether the vehicle was a pickup & horse trailer or just a pickup. Avallone's Ford pickup went into the ditch and rolled. His passing speed was disputed. Wade and another driver testified that she was signaling; Avallone denied seeing the signal because he claimed he did not see her vehicle until too late and then attempted evasive action. Wade, 52, bumped her head and sustained headaches and minor soft-tissue injuries.

State Farm took statements of Wade and Avallone and received the MHP report, and an adjuster took photos. Avallone was cited for unsafe passing. The ticket was dismissed when Wade did not appear at trial due to a snow storm. Judge Cebull admitted the ticket. He denied evidence of State Farm's payment for a damaged mailbox on the basis of the voluntary property statute.

The State Farm adjuster believed that Wade was more negligent than Avallone. He reviewed the facts of the accident and traffic statutes with his supervisor who agreed with him. She suggested that the adjuster check with in-house counsel Jo Ridgeway, who also believed that Wade's negligence was greater than Avallone's. State Farm denied Wade's claim, and Wade sued. Avallone's lawyer Martha Sheehy advised State Farm that she believed that Wade's negligence exceeded Avallone's.

Wade amended to add a punitives claim against Avallone. Avallone, represented by Douglas Howard, then counterclaimed alleging that Wade had caused the accident and his injuries. Donald Harris represented Wade in defending the counterclaim.

Wade offered to settle for $3,700. Based on Sheehy's advice, State Farm settled for that amount based on business considerations and because Avallone did not want to proceed with litigation for business and personal reasons. Avallone eventually dismissed his counterclaim without settlement. Wade then brought a common law bad faith action against State Farm alleging failure to investigate based on all available information and failure to effectuate a fair & prompt settlement when liability was reasonably clear.

Cebull directed verdict for State Farm on punitives, and granted State Farm's motion to prohibit any evidence of Wade's attorney fees in the underlying or bad faith action. Wade sought damages for attorney fees, costs, and emotional distress. Cebull struck one of Wade's experts prior to trial for failure by Wade to comply with previous orders regarding disclosure of expert opinions.

Plaintiff's expert: attorney Donald Harris, Billings.

Defendant's expert: Mike McNamee, Butte (claims handling).

Demand prior to trial, $60,000, withdrawn; offer, 0. Jury request, $3.7 million for emotional distress; jury suggestion, 0.

Jury deliberated 1 hour 45 minutes 4th day.

***Wade v. State Farm Mutual Auto Ins.*, CV-01-184-BLG, 1/15/05.**

Brad Arndorfer (Arndorfer Law Firm), Billings, for Wade; Robert James (Ugrin, Alexander, Zadick & Higgins), Great Falls, and Bradley Luck (Garlington, Lohn & Robinson), Missoula, for State Farm.

Ninth Circuit Court

INSURANCE: Plaintiff's expert properly excluded as discovery sanction... questioning of Defendant's personal attorney as to why no counterclaim properly barred by attorney-client privilege... bad-faith defense verdict affirmed... Cebull affirmed (unpublished).

A Billings jury found that State Farm did not commit bad faith in handling an auto collision claim by Ruth Wade against its insured Tim Avallone (MLW 1/22/05:3). Wade appeals, arguing that Judge Cebull erred in excluding expert testimony, barring questioning of Avallone's attorney, and denying recovery for attorney fees, punitives, and damages for non-severe emotional distress.

Permissible sanctions for Wade's noncompliance with Cebull's order granting State Farm's motion to compel production of all documents on which James Mathis relied in preparing his expert report include "an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence." Rule 37(b)(2). Given Wade's well-documented misconduct and its prejudicial effect in preventing State Farm's deposition of Mathis, Cebull's decision to exclude his testimony was not an abuse of discretion.

Cebull properly barred questioning Avallone's personal attorney Martha Sheehy as to why Avallone did not pursue a counterclaim against Wade. Communications between Avallone and Sheehy were privileged and would not be a permissible subject of testimony unless Avallone waived the privilege—which he expressly declined to do—or the communication fell within an exception to the privilege. *Palmer* (Mont. 1993). Montana courts recognize an exception to the attorney-client privilege where the insurer "directly relies on advice of counsel as a defense to the bad faith charge." *Id.* Wade argues that this exception applies because Sheehy filed a brief contesting Avallone's traffic citation in Justice Court and State Farm offered it as evidence at trial. However, the record contains no evidence that she acted as State Farm's counsel or provided advice to it.

Because we affirm the verdict in favor of State Farm on Wade's only cause of action we need not

reach her remaining issues concerning the proper measure of damages. *O'Bagy* (Mont. 1990).

D. Nelson, Paez, Smith.

***Wade v. State Farm Mutual Auto Ins.*, 05-35169, 10/27/06.**

Brad Arndorfer (Arndorfer Law Firm), Billings, for Wade; Robert James (Ugrin, Alexander, Zadick & Higgins), Great Falls, and Bradley Luck (Garlington, Lohn & Robinson), Missoula, for State Farm.

SETTLEMENT: $6.7 million, work comp bad faith.

In 11/99 Ann Bustell was hired by J-TABS to haul for North American Van Lines. On 12/2/99, while returning to North American in Fort Wayne, she was broadsided by another truck, suffering catastrophic injuries. The work comp insurer at risk was Ins. Co. of Penn. Adjuster AIG, after consultation with Montana counsel, denied the claim, alleging that Bustell was not an employee or was not within the course & scope of her employment. Subsequent to denial of the claim AIG retained SISR as third-party administrator. Donald Herndon defended the comp claim on behalf of AIG. Paul Toennis represented Bustell. In 9/00 AIG, at work comp mediation, raised for the first time its objection to Montana as the proper forum for the comp claim. In 5/02 Judge McCarter found the claim compensable and AIG's denial unreasonable and awarded attorney fees & penalty (MLW 5/18/02:5). AIG did not appeal and is now paying appropriate benefits including domiciliary.

Following the WCC decision, Bustell and former spouse Kelly Bustell filed a bad faith action against AIG and SISR alleging that AIG's denial of the claim and conduct throughout the adjustment was unreasonable and unlawful, caused severe emotional distress and significant physical manifestations, and required Kelly to provide attendant care services which directly contributed to deterioration of the marriage. Ann claimed that the fees & costs she incurred in the comp litigation as a result of AIG's unreasonable denial constituted a recoverable element of damage in the bad-faith litigation.

Trial of the bad-faith claim was set for 5/24/05. It settled 4/26 during court-ordered settlement conference with Dennis Lind for $5.7 million to Ann Bustell and $1 million to Kelly. AIG agreed to fully indemnify and defend SISR. All settlement funds were paid by AIG.

Plaintiffs' experts: attorney Terry Trieweiler, Helena; attorney Paul Toennis, Billings; Mark Cilo, MD (Craig Hospital), Denver; psychiatrist Joseph Rich, Billings; Belinda Hartley, MD, Billings; Rick Pullen, DO, Billings; Clifford Potts, MS, CRC, Billings; Cheryl Lyson, MS, LCPC, Billings.

AIG's experts: attorney Michael Heringer, Billings; adjuster Michael Marsh, Billings; neuropsychologist Steven Rothke, PhD, Northbrook, Ill.

SISR's expert: adjuster Larry Reed, Red Lodge.

***Bustell v. AIG Claims Service, Ins. Co. of Penn., and SISR Enterprises,* Yellowstone DV-03-468, settled 4/26/05.**

David Slovak & Tom Lewis (Lewis, Slovak & Kovacich), Great Falls, for Ann Bustell; Thomas Lynaugh (Lynaugh, Fitzgerald, Eiselein & Grubbs), Billings, for Kelly Bustell; William Mattix & David Charles (Crowley, Haughey, Hanson, Toole & Dietrich), Billings, for Ins. Co. of Penn. and AIG; Paul Odegaard (Cozzens, Harman, Warren, Harris & Odegaard), Billings, for SISR.

VERDICT: $1,000 for UTPA, no violation of cooperation clause, no UIM following $100,000 settlement, rear-end auto, closed-head.

A Billings jury found that Robert Davis did not violate terms of his cooperation clause when he resisted attending an IME at the request of Progressive Casualty and that he was not entitled to UIM benefits, but that Progressive violated the UTPA in handling his claim and awarded him $1,000.

Davis, then 42, was injured when he was rear-ended by Shawn McNeil while stopped in traffic on 1st Ave. N. in Billings in 2/98. He initially sued McNeil and his employer, insured by Safeco. Safeco settled for $100,000 policy limits.

Davis had been asked to attend the IME, but stated through counsel that he would resist going to see a physician who was not truly independent. He sued when Progressive would not make a decision. Progressive contended that he violated contract terms by refusing to attend an IME. He ultimately attended a court-ordered IME by Lennard Wilson and Catherine Capps.

McNeil's lawyer Geoffrey Keller testified as to his view of the underlying case and that it had a value at or below Safeco's payment.

Plaintiff's experts: retired claims examiner Bruce Holton, Trenton, N.J. (testified that Progressive acted unreasonably in delaying handling of the claim and had never firmly scheduled the IME); neurologist Richard Nelson, Billings (testified that Davis suffered a closed-head injury); economist Ann Adair, Billings; James Fortune, Billings (voc-rehab).

Defendant's experts: attorney Charles Cashmore, Billings (claims handling); neurologist Lennard Wilson, Missoula (testified as to the diagnosis of closed-head injury and lack of causation).

Demand, $650,000; $25,000 offer of judgment. Jury request, $750,000; jury suggestion, 0.

Jury deliberated 2½ hours including lunch 5th day; Magistrate Anderson.

***Davis v. Progressive Casualty Ins.*, CV 02-178-BLG, 4/25/05.**

Kenneth Peterson (Peterson & Schofield), Billings, for Davis; Robert Phillips & Timothy Peck (Phillips & Bohyer), Missoula, for Progressive.

VERDICT: $75,000 net UIM ($100,000 less $25,000 paid by other driver), hung jury on bad faith.

A Missoula jury found that $100,000 would reasonably & fairly compensate Marlene McCluskey for injuries and harm caused by a 2/02 auto accident in relation to her UIM claim against Allstate Ins., but was unable to reach a unanimous verdict on her UTPA claims. When it indicated that it was unable to reach a 7-0 verdict on the UTPA claims Magistrate Erickson bifurcated the UTPA and UIM claims so it could reach a decision on the UIM claims, leaving UTPA and punitives claims to be resolved at a later date. The jury was instructed to not consider the $25,000 previously paid by Progressive Ins. as that will be reduced by the Court from whatever amount it found. In an apparent attempt to decide the UTPA claims the jury entered 4 hatch marks after "yes" and 3 after "no" following the question of whether Allstate committed unfair claims settlement practices by neglecting to attempt in good faith to effectuate a prompt, fair, and equitable settlement of McCluskey's claim, and some indecipherable marks in the "yes" and "no" blanks as to failing to conduct a reasonable investigation of her claim. The blanks following queries relating to unnecessarily incurring attorney fees/costs, reasonable basis for disputing the amount of McCluskey's claim, the amount of UTPA damages, and whether Allstate was guilty of actual malice so as to warrant punitives were left blank. A scheduling conference is set for 4/13/06 as to the UTPA case, and McCluskey has moved for an order permitting juror interviews.

McCluskey was injured when the car in which she was a passenger collided with a car driven by Robert Marquardt on I-90 in Missoula Co. She settled with Marquardt's insurer Progressive for $25,000. When she submitted her UIM claim to Allstate more than a year later she demanded full stacked policy limits of $50,000, contending that her damages greatly exceeded the $25,000 limits paid by Progressive. Allstate initially told her that based on the information it then had she had been fully compensated by the $25,000 from Progressive. In 2/04, after receiving additional medical records, it offered $5,000 in addition to her settlement from Progressive and the medicals to be paid.

McCluskey filed this suit in 9/04 alleging breach of contract and violation of the UTPA and requesting punitives. She alleged that the limits of UIM were lifted by Allstate's unreasonable refusal to timely pay the UIM limits, and that she was entitled to the $50,000 UIM plus interest, attorney fees, compensation for her time trying to resolve her claim, and general damages for emotional distress, anxiety, fear, stress, anger, inconvenience, and frustration caused by Allstate's actions, and punitives. She contended that Allstate drug its heels and refused to pay her UIM without a reasonable and timely investigation based on all available information and neglected to attempt in good faith to effectuate a prompt, fair, and equitable settlement when liability had become reasonably clear that her claim exceeded the $25,000 limits of Marquardt's policy. She contended that Allstate followed a company wide claims practice which uses a computer data base (Colossus) to evaluate PI claims and UIM claims, which can be manipulated in a manner designed to result in unreasonably low values to be used against claimants; monitoring, evaluating, and rewarding claims personnel on their ability to settle UIM claims at or below the computer-generated values; discouraging unrepresented claimants from hiring attorneys; requiring insureds like her to have their claims adjusted long-distance by out-of-state adjusters; and forcing insureds like her to incur the time, delay, and expense of litigation unless they are willing to accept Allstate's unrealistic and unreasonable Colossus-generated settlement values.

Allstate disputed McCluskey's contentions, and contended that she did not incur her claimed damages, punitives under the facts of this case would violate the Montana and US constitutions, some or all of her claims are barred, preempted, or excluded by §33-18-242, she made material misrepresentations in her claim, and she did not fulfill her obligations under the policy. It contended that none of its UTPA duties were breached and that even if they were, it had a reasonable basis in law or fact for its conduct, which precludes liability under the UTPA.

Allstate contends that McCluskey was allowed to present evidence that it was acting in bad faith right up through questioning of witnesses at trial, and that after she rested she dismissed any claim that it acted in bad faith after the date she filed her complaint and Erickson then precluded Allstate from presenting evidence, including an IME by orthopedic surgeon Catherine Capps, in response to the allegations she had already made concerning its post-filing conduct. It contends that the IME demonstrated that her claimed injuries pre-existed the accident.

McCluskey contends that Erickson precluded Capps from testifying because Allstate failed to provide a Rule 26 expert disclosure. She also disagrees with Allstate's interpretation of Capps's IME, contending that it agreed with Dr. Heetderks's opinions that the accident caused a permanent aggravation of her preexisting knee condition, accelerating her need for a total knee replacement.

(See summary judgment and in limine order, MLW 3/4/06:5-6 for additional facts and contentions.)

Plaintiff's experts: John Gillespie, Wise River (insurance claims); Daniel Cahalan, Missoula (business ethics); orthopedic surgeon David Heetderks, Helena.

Defendant's expert: Lanny Stevens, Laramie (insurance claims).

Prayer in complaint, $10,550,000 plus fees/costs, lost time from work, interest. Settlement demand, $675,000 for both UIM and bad faith; offer, 0 (Allstate previously offered $13,000 for UIM, including medicals). Jury request, $205,000 for UIM plus attorney fees; jury suggestion, $38,000 (including the $25,000 from Progressive).

Jury deliberated 7 hours 9th day.

***McCluskey v. Allstate Ins.*, CV-04-191-M, 3/3/06.**

Mick McKeon & Rick Anderson (McKeon & Anderson), Butte, for McCluskey; Dale Cockrell (Christensen, Moore, Cockrell, Cummings & Axelberg), Kalispell, and Ronald Getchey (Luce, Forward, Hamilton & Scripps), San Diego, for Allstate.

Salish & Kootenai Tribal Court

VERDICT: Defense, UTPA, $100,000 underlying auto settlement.

A 6-0 Pablo jury found that Progressive Specialty Ins. violated Montana's UTPA or acted in bad faith in handling Francene Burland-Kelly's claim, but that it had a reasonable basis in law or in fact for its actions.

Burland, in her 50s, was rear-ended by Progressive's insured Dustin Colman in Ronan in 7/02. She had several years of prior cervical symptoms and filmed evidence of degenerative disk disease. She was released from PT in 9/02 with full range of motion and normal neurological evaluation, and ceased any further treatment until 3/03. Kenneth Brewington performed a C5-6 fusion in 8/03 and related the need for surgery to the 7/02 accident. Lennard Wilson performed a medical records review and subsequent IME, and concluded that any need for surgery was a result of the natural progression of her DDD. Progressive advanced $5,200 med-pay through the PT and paid her property damage. It declined approximately $35,000 medical bills related to the surgery. Kent Duckworth demanded $100,000 policy limits and sued Colman and Nationwide (UIM) in Tribal Court. Progressive paid policy limits shortly before trial when defense counsel could not locate Colman for trial. Burland then filed a UTPA/common law bad faith suit against Progressive in Tribal Court seeking compensatory and punitive damages. She also alleged that Colman's counsel were agents of the insurer and had engaged in improper litigation tactics. Magistrate Erickson previously ruled that Progressive was required to exhaust tribal remedies before submitting jurisdiction issues to Federal Court (MLW 8/13/05:6).

Plaintiff's experts: attorneys Kent Duckworth, Ronan, and Zander Blewett, Great Falls.

Defendant's experts: attorneys Donald Robinson, Butte, and Gary Graham, Missoula.

Demand, $300,000; offer, $185,000. Jury request, $8,000 costs in underlying case, reasonable amount for emotional distress, punitives; jury suggestion, 0.

Jury deliberated 6 hours 4th day; Judge Pluff.

***Burland-Kelly v. Progressive Specialty Ins.*, 05-5-CV, 3/30/06.**

Mick McKeon (McKeon & Anderson), Butte, for Burland; Geoffrey Keller & Jacqui Hughes (Matovich & Keller), Billings, for Progressive.

VERDICT: $66,666.67 attorney fees, $1,705.71 costs, $350,000 punitives, insurance bad faith.

A Great Falls jury found 10-2 that Allstate Ins. violated the UTPA by misrepresenting pertinent facts regarding an insurance claim by Robert Jacobsen. It found 12-0 that Allstate did not violate the UTPA by refusing to pay a claim without a reasonable investigation based on all available information. It found 11-1 that Allstate violated the UTPA by neglecting to attempt in good faith to promptly, fairly, and equitably settle a claim in which liability was reasonably clear. It found 11-1 that Allstate violated the common law duty of good faith and fair dealing by either: misrepresenting pertinent facts regarding an insurance claim to a 3rd-party claimant, or refusing to pay a claim without conducting a reasonable investigation, or neglecting to attempt in good faith to promptly, fairly, and equitably settle a claim in which liability was reasonably clear. It found 11-1 that Allstate's conduct was a cause of actual damage to Jacobsen. It found 11-1 that he would be compensated for his damages by $66,666.67 attorney fees and $1,705.71 costs in the underlying action. It found 11-1 that by clear & convincing evidence Allstate is not guilty of actual fraud in handling Jacobsen's claim so as to warrant an award of punitives, but that it is guilty of actual malice in handling Jacobsen's claim so as to warrant an award of punitives. It 8-4 awarded $350,000 punitives.

Jacobsen was rear-ended by an Allstate insured 5/12/01 in Great Falls. He went to the ER twice and followed up with Ronald Peterson who diagnosed cervical/lumbar strains, and, according to Plaintiff and disputed by Defendant, other conditions including shoulder problems. He limited him to sedentary work for 2 weeks, and ordered 3 weeks of PT and to report back in 2 weeks. On 5/17/01 Allstate "unrepresented unit" adjuster Chuck Conners interviewed Jacobsen by phone. Jacobsen mentioned having spoken with an attorney who offered to pay his mortgage, which prompted Conners to explain that while it was entirely Jacobsen's decision whether to hire an attorney, there were certain "attorney economics" he should know, including that attorneys generally "take" (according to Plaintiff) or "charge" (according to Defendant) fees of 25-40%, and that Allstate's evaluation would not change just because an attorney is involved. Jacobsen explained that he was a self-employed carpet layer who needed money to pay his bills and asked Conners to advance-pay his lost wages. Conners said he could advance-pay medical expenses but not wages but he would discuss the wage issue with his boss. His boss stated that Allstate's policy was not to advance wages and he did not want to set precedent by paying wages in this instance. However, to accommodate Jacobsen's need for money he suggested that Conners evaluate the claim using "fast track" procedures, which give adjusters settlement flexibility in some cases. Conners did so and offered Jacobsen $3,000 plus 30 days of open medical expenses. Jacobsen countered at $6,000 plus 90 days of open medicals. Conners increased his offer to $3,500 plus 45 days of open medicals. Jacobsen initially rejected that offer, but the next day called back and accepted it. To expedite the settlement, Conners had Jacobsen go to the Great Falls drive-up property damage service that day to pick up a check and sign a release.

In mid-June Jacobsen had a sudden increase of shoulder pain while mowing his lawn and went to the ER and met with a paralegal for Richard Martin. Martin wrote to Allstate 6/21/01 demanding that it set aside the release, and on 7/03 it did so, and thereafter began advancing lost wages. Jacobsen eventually underwent 2 surgeries on his left shoulder. Medicals totaled approximately $30,000. The parties settled the underlying case in 11/02 for $200,000.

In 2/03 Jacobsen sued Allstate, Conners, and Carl Nelson, the property damage adjuster who presented him with the release, alleging that Allstate had breached its duties by settling 5/18/01 before his claim was ripe and without adequate investigation, including obtaining medical records. He alleged that Conners misrepresented facts by telling him he would be okay and that "soft tissue" injuries heal, and that he failed to include in the "attorney economics" the fact that represented claimants recover more than unrepresented claimants, as indicated by Allstate's Claim Core Process Redesign manual. He alleged that Allstate refused to advance-pay wages when it knew he was financially strapped, and that all actions by Conners in connection with the 5/18 settlement were part of a nationwide plan to increase profits by reducing attorney involvement and settling claims as quickly as possible when the claimant is unrepresented. He alleged that he was forced to retain counsel and ultimately pay him 1/3 of his recovery plus costs as a result of Allstate's tortious conduct in handling his claim. He later dismissed Conners and Nelson. He alleged at trial that the CCPR called for specifically assigned & trained adjusters to handle unrepresented claimants, establish empathy & rapport to gain their trust, and go through an 8-9-step process wherein the claim process was described in short and "attorney economics" is discussed. He argued that the CCPR demonstrated Allstate's intent to lower "severities" through use of "attorney economics," including explaining that retaining an attorney would reduce the gross settlement, without disclosing that its own manual showed an increase in settlements 2-3 times with the help of an attorney. He alleged that limited or no investigation was undertaken, pursuant to the CCPR and Conners's testimony.

Allstate denied all allegations of wrongdoing and argued that it bent over backward to accommodate Jacobsen from the outset. It argued that Jacobsen, not Conners, was the one pressing for an early settlement, and that Conners could not be criticized for not initially advancing wages because prior to *Dubray* it was understood that wages were beyond the scope of *Ridley*, as illustrated by words to that effect in *Safeco* (Mont. 2000). Allstate alleged that its investigation of Jacobsen's claim prior to the 5/18 settlement was reasonable given the relatively minor nature of the injuries which Jacobsen himself was then reporting (disputed by Jacobsen), and that he, not Conners, said he would be okay because Peterson

had told him so. Allstate alleged that the "attorney economics" Conners told Jacobsen about was entirely accurate and that Jacobsen's claims about Allstate trying to minimize attorney involvement were moot since he had spoken with counsel before he talked with Conners, and that in any event the initial settlement was more that what claimants receive on average when represented by counsel. It argued that Jacobsen could not claim any damages because attorney fees are not an element of damages in a 3rd-party bad faith claim, and that he had retained counsel before asking Allstate to set aside the release. Allstate's causation argument was based on evidence that Jacobsen's request to Conners (assuming it occurred) was 6/15/06, after he had already been to Martin's office and spoken with a paralegal.

On the eve of trial Judge Sandefur granted Jacobsen's motion in limine to exclude evidence of his previous breach of contract/"bad faith" claim, which established that NIED-type damages are not "bodily injury" within the meaning of a UM policy, *Jacobsen v. National Farmers Union* (Mont. 2004), reasoning that since he had previously granted summary judgment on his NIED claim against Allstate the prior action was irrelevant.

During trial, Sandefur:

- Denied Allstate's motion to reconsider his previous rulings on the attorney fee issue in light of *Sampson* (Mont. 2006), reasoning that while it prohibited fees under the UTPA and common law bad faith, it did not preclude fees under the "equitable" or "insurance" exception to the American Rule.
- Overruled Allstate's objection to testimony by Jacobsen's bad faith expert that, while advancing wages was not industry custom & practice at the time, it was not uncommon, Allstate could have initially advance-paid Jacobsen's wages, and its failure to do so pressured him into the initial settlement. Although ruling pretrial that Allstate had a reasonable basis for not advancing wages prior to *Dubray*, he ruled that wage loss testimony was permissible if based on industry custom & practice.
- Denied Allstate's motion for directed verdict on punitives.

Plaintiff's expert: attorney Jerry Ramsey, LA & Missoula (insurance "bad faith").

Defendant's experts: none.

Demand, none according to Plaintiff, $1,250,000 according to Defendant; offer of judgment, $25,000. Jury request, $66,666.67 attorney fees and $1,705.71 costs in underlying case, $11-12 million punitives; jury suggestion, 0 compensatories, unspecified punitives. Mediator, Thomas Keegan.

Jury deliberated 5 hours 4th day on compensatories, 4 hours 5th day on punitives.

***Jacobsen v. Allstate Ins.*, Cascade ADV-03-201, 10/19/06.**

Lucas Foust & Daniel Buckley (Foust Buckley), Bozeman; Paul Haffeman & Dennis Tighe (Davis, Hatley, Haffeman & Tighe), Great Falls, for Allstate.